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This Land of Liberty

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THIS LAND OF LIBERTY

BY

ERNEST SUTHERLAND BATES

Iocasta.—What is the being deprived of one's country?
Is it a great ill?
Polynices.—The greatest.
Iocasta.—What is the reason of this?
Polynices.—On account of one thing and that the greatest—not to have liberty of speech.
—Euripides, *The Phœnician Maidens*

New York and London
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1930

UNIVERSITY OF CALIFORNIA

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HUNTINGTON COLLEGE

TO
THE SPIRIT OF RANDOLPH BOURNE
ALIVE
WHEREVER A MINORITY
OF ONE OR MANY
HOWEVER HOPELESSLY
FIGHTS ON

★

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Preface

Such originality as this work possesses lies not in any collection of hitherto inaccessible material, but in its being the first, so far as I know, to attempt a correlation of the main facts in many different lines of activity, in an endeavor to obtain a single view of the whole contemporary attack on liberty. Such an attempt would have been impossible without the previous painstaking work, in special fields, of those members of the small body of defeated but unrouted liberals who are frequently mentioned in the following pages—Leon Whipple, Theodore Schroeder, Norman Thomas, Zechariah Chafee, Norman Hapgood, Heywood Broun, the editors of the *Nation* and the *New Republic*, and, above all, Roger Baldwin, director of the American Civil Liberties Union, whose labors, embodied directly or indirectly in a score of detailed pamphlets, have been absolutely fundamental. My obligations to these and other writers mentioned in the text could only be duly indicated by copious and elaborate footnotes, in default of which I wish to make here, thankfully, the fullest acknowledgment. But while I have derived information and inspiration from these writers, none of them, of course, is to be held in the least responsible for my method of approach or my conclusions. It is the strength, as well as the weakness, of liberalism, to permit the merriest bouts among its own defenders.

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ERNEST SUTHERLAND BATES

CHAPTER I

Our Unjust Day

They who deny freedom to others, deserve it not for themselves, and under a just God cannot long retain it.

—Abraham Lincoln

If there be a country where knowledge cannot be diffused without perils of mob law and statute law; where speech is not free; where the post-office is violated . . . that country is, in all these respects, not civil but barbarous.

—Ralph Waldo Emerson

Give me the liberty to know, to utter, and to argue freely according to my conscience, above all other liberties.

—John Milton

Freedom is a mood, a frame of mind.

—James Harvey Robinson

No matter whose the lips that would speak, they must be free and ungagged. The community which dares not protect its humblest and most hated member in the free utterance of his opinions, no matter how false or hateful, is only a gang of slaves. If there is anything in the universe that can't stand discussion, let it crack.

—Wendell Phillips

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CHAPTER I

Our Unjust Day

I. The Temper of the Hour

Americans live in a haunted house. Ghosts linger on the threshold—ghosts of long-dead patriots. Amid the uproar and merriment of the hour we are still dimly conscious of them. They are not spirits, but mere astral shapes, empty shells that we fill for a moment with the cackle of our own voices, roving names whose owners are far away. Washington sleeps soundly in Mount Vernon, and Jefferson hard by in Monticello. They and their comrades fought and argued and labored to leave to their descendants a spiritual heritage which these descendants no longer value. We reverence the names of the "Fathers," but have forgotten their works; if we quote their utterances it is without troubling to understand the meaning of the words. Not many years ago there was a man in the White House whose speech sounded like Jefferson's and we were satisfied; a little later there was one who looked like Washington and we were satisfied: yet these were no more like to them than Hamlet to Hercules. Inscribed on Jefferson's tombstone by his own desire is the record of the three achievements by which he wished

to be remembered: the authorship of the Declaration of Independence, the authorship of the Virginia Toleration Act, the foundation of the University of Virginia—political liberty, the separation of church and state, the establishment of public education. But today the Declaration of Independence might almost as well have been written in an unknown tongue, the church has crept back into partial control of the state, and although there are schools, there is little education.

We, the people of the United States, so runs the tale, once organized a nation in order "to establish justice . . . and to insure the blessings of liberty to ourselves and our posterity." This, according to the Declaration and the Constitution, was to be the justification of our national existence. The blessings of liberty that were to be insured embraced many kinds of blessing: personal and political liberty; freedom of speech, press and assembly; freedom from arbitrary search and seizure; freedom from unwarranted arrest and imprisonment. Not one of these remains. Time was that a man's home was his castle. Today it is as "open as a doghouse," as Justice W. S. Snow of Alexandria declared last year in overruling the defense attorney who objected to the entrance of the police into his client's dwelling without a warrant. Even the idea of liberty has been whittled away until nothing is left. Whereas, according to Thomas Jefferson, "To secure these rights [to life, liberty and the pursuit of happiness] governments are instituted among men, deriving their just powers from the consent of the governed," according to a more recent exponent of Americanism, Calvin Cool-

idge, "The righteous authority of the state . . . is the sole source of the liberty of the individual." According to the Declaration, governments derive their just powers from the consent of the governed; according to Mr. Coolidge, the governed derive their just powers from the consent of the government. And it is Mr. Coolidge, not Thomas Jefferson, who is countenanced in court today. The enunciation of the New York Appellate Court is typical of contemporary thought in America—"Liberty means the right of one to use his faculties in all lawful ways." Obviously, then, there can be no such thing as an oppressive law; if a law suppresses any liberty, the right to this liberty automatically disappears. The state now has all the "natural rights" which the individual once possessed. If in doubt, ask a policeman! Furthermore, the notion that in this country a man is held to be innocent until he is proved guilty is a pure myth. On the contrary, if once arrested he is treated as guilty until he is proved innocent and sometimes even after he has been proved innocent. The police in America possess and exercise despotic powers. The "third degree," brought over from Prussia, has become a prosperous American institution. The decline of liberty has been accompanied—inevitably, as I shall maintain—by an increase of lawlessness, and one of the most lawless elements in the whole community is the police. The United States, both in fact and in theory, is no longer the United States we have loved.

"To establish Justice." Ironical words. Can anyone really believe that the justice the Fathers were thinking

of had anything in common with that practiced in the United States today? Would it have been their kind of justice to sentence prisoners to death when there was so great a reasonable doubt that almost all the leading writers of the country joined in protest? Would they have left a man in prison for thirteen years after the jury that convicted him and the judge that sentenced him both declared their belief that he was innocent? Would a grand jury in those days have considered it murder in a group of men to defend themselves against an unprovoked attack, and at the same time have refused to indict another group for killing an innocent woman on the highway, simply because the former were strikers and the latter strike-breakers? A long series of such cases has proclaimed to the whole world the nature of American liberty and justice. The Greek shoeblack is nearer to Pericles, the Jewish pawnbroker nearer to the Prophets, than the spirit of modern America to that of the founders of the republic.

Those anxious to avoid the issue will quibble over the meaning of the words "Justice" and "Liberty" and indulge their wit in fine-drawn legal distinctions. I am not averse to going into such subtleties in their due place as an amusing intellectual game; but when subtleties are seriously advanced merely in order to paralyze accepted meanings they cease to be very amusing. Such accepted meanings, which might be called minimum meanings, humanity has long possessed in regard to these two words. Let us abandon for the moment all attempt to understand the Declaration of Independence and the

Constitution, and descend to lower ground. "Liberty" means, at the very least, that a man shall be permitted to think his own thoughts, if he has any. Fortunately, this permission has been granted by nature so effectually that it cannot be directly revoked by men. But Americans have done their best to revoke it indirectly, as we shall see in sad enough detail. "Justice" means, at the very least, that one man shall not be punished for an act which entails no punishment on his neighbor. I shall hardly need to prove the point that even this minimum justice is habitually disregarded in America. Anyone can prove it for himself by going to the nearest open speakeasy and noting the padlocked speakeasy next door.

But "Justice" and "Liberty" are words which also have what might be called maximum meanings. "Justice" means, at the most, that the laws shall not only be equally enforced but shall be of such a nature that their enforcement actually benefits all men. Neither this justice nor anything much like it has been attained in any society thus far achieved. But it is an ideal that humanity abandons at its peril. "Liberty" means, at the most, that a man shall say and do what he pleases. To play as we please, to study as we please, to work as we please, and to live as we please—this is the natural desire of every man. Its complete fulfillment is evidently impossible. Yet every free spirit will demand it for himself, and every generous spirit will accord it to others, just as far as is humanly practicable. The slave, on the other hand, dares not demand it for himself, and the tyrant will not accord it to others. Midway between the slave and the

tyrant stands the churl who finds his own pleasure in needlessly interfering with the pleasure of his neighbors. The paradox of the whole situation is that if one abandons justice and liberty, as ideals, in their maximum meaning, he will soon lose them, as facts, in their minimum meaning.

It would be foolish to deny the existence of free and generous spirits in America today. Is not this book addressed to them? But whereas a century ago they were in the saddle, today the churl and the tyrant ride. And many a modern man with the desire but without the courage or the power to be free has fallen into slavery. Thus we might say that most of the teachers in America and many of the working class are slaves, that most of the "big businessmen" and many of the police are tyrants, that most of the so-called "vice reformers" and many of the churchmen are churls. But this would fail to recognize the complexity of modern society. A congressman, for instance, may be a slave toward his constituents, a tyrant in the laws he helps to pass, and a churl in his devotion to some narrow religious sect. Furthermore, there are no churls and few slaves who would not like to be tyrants if they could be. It is really a complex tyrant-slave-churl temperament that rules America at the present hour.

II. Results of the Machine Age

Respect for individual personality is the final fruit of culture, but individual personality itself is the first gift of nature to man. Everything that exists is individual,

but man alone possesses that consciousness of individuality which makes him a person. He is thereby saved from being a mere dash of foam on nature's ocean and becomes an end unto himself, recognizing self-chosen values. The cat has her better and worse moments, but, so far as we know, she never sighs to herself, "The end of a perfect day," or wishes her mate a "happy new year." Man, on the other hand, through his self-consciousness, finds his life something in which he takes deliberate delight or pain, something which he approves or disapproves. His personality is thus his very essence. But nature has granted him this manumission from her rule with some reluctance, and accompanied it with a copious supply of herd instinct shared with the admirable ant and the dubious wolf. Only gradually through centuries of history has man's individual manhood and sense of individual personality developed. For instance, even so advanced a race as the Egyptians seems at one time to have considered that the monarch was alone worthy of personal immortality. It was well enough to say, "Ho, this Pepi!" as the royal soul journeyed toward the courts of the Sun, but the million lesser Pepis went down into the grave and stayed there. Genuine recognition of personality was reserved, at least in the West, for the Greeks and the Jews. Enhanced by Christianity, it persisted through the Middle Ages, and developed continuously in later times until checked by modern industry.

Modern industry cares nothing for human personality as such. It is interested in the individual only in two aspects—as a producer and as a consumer—that is, as a machine and as a user of machine products. The laborer

is a power-producing instrument whose value, like that of any other machine, depends on the relation of output to the cost of upkeep. Uniform products manufactured by uniform labor demand a uniform market. Business can only be supremely successful where there is a standardized body of consumers whose needs and desires can all be known beforehand. Thus there has developed the modern army of salesmen, carrying the latest psychological weapons of attack against individuality of taste. And, of course, the habit of treating employees and public as machinery develops a machine-like spirit in the employer. Since every government sooner or later expresses the temperament of the people, we are gradually approaching a rather notable variant of Lincoln's ideal, namely, government of machines, by machines, and for machines.

More and more, in business and in pleasure, do we grow alike—and we in America were too much alike to begin with. Similarity of living conditions from the outset tended to breed similarity of character. "The surprising uniformity of American life," writes Zechariah Chafee, "has long excited attention from foreign observers." We find Tocqueville commenting on it as early as 1835. Leading identical lives, we have come to expect identical ideas. "Much of the panic-stricken dread of Socialism," says Chafee, shrewdly, "is due to the sentiment that we must have unanimity of thought in this country." The utmost diversity of political thinking that we seem willing to tolerate is that between the Republican and Democratic parties, which Daniel Halévy wittily compares to the Louvre and Bon Marché department stores in Paris, both selling the same kinds of goods to

the same kinds of people. Instead of dreading standardization as a disease, we actually seem to want it, and peddle the poisonous stuff about through the newspapers, over the radio, in the movies, at church, at school, at club. This is, of course, a definite acceptance of the mechanical ideal, uniformity being as distinctive a characteristic of machines as diversity is of human beings.

If a machine could talk, it would probably boast; and if it boasted, the tenor of its discourse would almost certainly be a eulogy of its own power. The common characteristic of the machine age in every country is a reversion to the ideal of power as a substitute for liberty and culture. In America, where our national experience has been mainly concerned with the physical world, first in opening up a new continent and then in developing its material resources, our extraordinary success as power-producers has rendered us peculiarly susceptible to this return of the barbaric ideal. We have always been prone to think in quantitative terms. Nature herself, on the American continent, set us a grandiose example. Long ago we came to talk of the size of *our* mountains, lakes, and rivers as if we had created them ourselves. Working blindly but enthusiastically in her own spirit, we have built up our enormous industries, our huge cities with their toppling skyscrapers, our plethoric institutions of learning. It is a common European mistake to think of Americans as lovers of money. A nation that spends so lavishly on its amusements, that spends so generously on famine relief in all parts of the world, is not amenable to that charge. Niggardly we are not. The national type, represented by the business man, is nearer the spendthrift

than the miser, but nearer the ambitious ruler than either. We have never been lovers of money; we are no longer lovers of liberty; lovers of power we are. Men usually win what they love, if they are willing to pay the price. We have become the most powerful nation in the world, but at the price of health, leisure, freedom, and sense of spiritual safety. The price was too high.

Love of power and reliance on it bring the reverse of spiritual safety. The center of one's being is placed outside himself in the material means on which power ultimately depends. Force may always be overcome by greater force. The individual or the nation that relies on it must always be on guard. Thus fear enters the heart and abides there. The greater the possessions that are liable to loss, the greater will be the fear. Hence the apparent paradox that the powerful United States of today is so much more timorous than the feeble Thirteen Colonies. Hence it is that the strongest and most wealthy class in the community is the most nervous. When a man says, "If I had a larger income I would dare to speak out in this matter, but just now I can't afford to," he is self-deceived. Had he the larger income, his lips would be even more closely locked. It is vain to look to wealth or strength to supply the bravery we lack.

The first victim of fear is reason. There is such a thing as the threshold of reason as well as the threshold of consciousness. It is wont to be raised at the approach of danger. All men have skeletons in their psychological closets that they refuse to examine, closets guarded by sealing up the mind against disturbing doubts. Every public speaker knows the signs of the closed mind. The

face assumes a determinedly deaf expression which proclaims that words are useless; it becomes a kind of blank and exceedingly uninviting wall. The hearer's expression indicates that the speaker has unwittingly trodden near the skeleton closet and will not be permitted a closer approach. Such raising of the threshold of reason has become so general in America that now the drawbridge flies up at the first hint of alarm. The number of topics dangerous to discuss publicly from any but the most conventional point of view recalls the taboos of savages. Religion, politics, sex, art, and literature (at least in Boston), prohibition, Bolshevism, Fascism, the English, the Germans, the Irish, the Jews, the Hindus, the Negroes, Mrs. Eddy—soon there will be nothing left but the weather. I am not sure that it would be safe even to criticize the weather in southern California.

The freedom of discussion thus so blithely denied is fundamental to every other liberty. Granted it, though all other rights were taken from us we could recover them in time; without it, even existence is precarious and of no great worth. To strike at freedom of speech is to strike at the essence of everything human. Thought itself depends upon the interchange of ideas; all periods of progress have been marked by rapid intercommunication. The makers of the American Constitution understood the social, as well as the individual, aspects of thought and they bracketed in a single sentence the rights to freedom of speech and freedom of assembly. They knew that the former could not exist without the latter. So they forbade Congress to pass any law "abridging the right of the people peaceably to assemble." But far-

sighted as the Fathers were, it never occurred to them that the time would come when, not Congress, but every whipper-snapper of a local mayor or chief of police would take it upon himself to nullify the Constitution. Yet such is now the case. The movement has been nation-wide to control public meetings by means of ordinances requiring permits. If the subject of discussion is at all "dangerous"—*i.e.*, important—the permit is refused. Even if granted, it can be arbitrarily revoked at any moment, as in Boston last year at a meeting in memory of Sacco and Vanzetti, where, as soon as the dreaded names were mentioned, the chief of police arose and ordered the crowd home. "But we have a permit," said the speakers. "You had; I withdraw it," said the chief. Just like that.

The excuse always offered on such occasions is that the assembly is an "incitement to riot." That public discussions of birth control, forbidden in Boston and elsewhere, should lead to riots might seem, to the average citizen, an unlikely contingency, but the official mind works in ways of its own. Its quaint meanderings are well illustrated in the remarks of a mayor of Wilkes-Barre (a town in Pennsylvania named for the English radical, John Wilkes, who would now hardly be permitted to enter it):

> These [Communist] meetings have in the past been the occasion of breaches of the peace. The best example of this was the way the young men composing the American Legion invaded the hall at yesterday's meeting and stopped the proceedings. . . . I shall not tolerate any organization holding

meetings in this community that is opposed by the American Legion. All meetings of this character in future will be submitted to the Legion committees for approval before they are permitted.

Query: When is a riot not a riot?

Answer: When it is conducted by the American Legion.

In nearly all such instances the arbitrary proceedings of local officials have been upheld by local courts. Not infrequently the judge even runs wilder than the mayor, as, for example, that judge of Passaic, N. J., who fixed the bail in an "incitement to riot" case at $30,000! Long terms in jail await the man who trusts in the spirit of the Constitution today.

America is a sick giant trembling at the sight of a mouse. And this giant is obsessed by the morbid notion that his own children are trying to poison him. Although instinctively a good-natured fellow, he treats them harshly and, at times, with abominable cruelty.

III. Hypochondriac Laws

> The difference between morality and right (*i.e.*, just law) is a difference in degree and not in essence. Yet it is a very important difference, as it reduces the power of coercion to what is absolutely necessary for the harmonious coexistence of the individual with the whole.—Lioy, *Philosophy of Right.*

The psychology of force, fear, and cruelty has been particularly evident in recent legislation. Dominant

groups everywhere have shown themselves eager to enforce their wills upon a reluctant minority or cowed majority by the aid of the policeman and the jailer. Especially has this been the case where there was wide difference of opinion, as with many of our so-called "reforms." Descendants of men who believed in the verbal inspiration of the Scriptures, modern "reformers" still believe in verbal inspiration—but it is now their own. They would fain persuade us that any silly enactment they may succeed in putting through a legislature thereby becomes sacred. Many of them talk as if Wayne B. Wheeler's "Volstead Act" were the veritable voice of God. By attempting to secure for every law, regardless of its nature, the respect properly accorded to wise laws, and by demanding penalties out of all proportion to offenses, they have succeeded in so muddying the waters of American legislation that it has become a stinking pool. More laws are enacted, in proportion to population, in the United States than in any other major country, and there is more crime. Strange that our lawmakers have never noted the coincidence. They jerk out a new law as recklessly as a highwayman jerks out a gun. The result is what might have been expected. Where the same or greater reverence is demanded for the latest whimsy of some pressure group which happens to be momentarily in political power as for the most fundamental codifications of age-old experience, the moral conscience becomes hopelessly confused. And a confused conscience is the best possible breeding-place for crime.

The chief difficulty in obtaining a clear idea of the nature of law lies in its twofold character. Like human

beings themselves, law is a psycho-physical affair. On the one hand, it is obviously an appeal to force; on the other hand, this force is supposed to be exercised in the service of reason. Men are likely, in their disputes, to resort to physical strength; law is a device whereby this tendency can be regulated and utilized to the advantage of all. Originally a substitute for clan warfare and the duel, law still moves in the shadow of its origin. It can still be made a mere form of expression of personal and group hatred. In such cases it may possess physical power without moral authority. The power of any law depends upon the ability of the police to enforce it, but its authority is derived from the rational end which it is designed to serve.

No law is justifiable to accomplish an end which can equally well be gained without it. The appeal to force, even legalized force, should surely not be employed until the power of moral suasion has been exhausted. If human beings were all-wise and all-good, there would be no need for legislation. The amount of the need is the measure of their depravity or ignorance. Laws are in this respect like drugs—needful in disease but ridiculous in health. A hypochondriac, however, will take his drugs, and a dishonest physician will prescribe them, when there is not the slightest benefit to be gained by their use. The hypochondriac is worried over the future rather than the present. He is in a blue funk over what he thinks may happen to him tomorrow. His symptoms are nothing in themselves, but he indulges in the wildest fancies as to the evils that will result from them. Much of the legislation in the United States during the last few years

is hypochondriac legislation. It penalizes acts not for what they are in themselves, but for their supposed tendencies. Freedom of speech has been suppressed and men sent to prison not because their words actually incited anyone to crime, but because some one might conceivably be so incited by them. Books and plays have been suppressed, not because they have actually injured anyone (members of Watch and Ward societies are the last people to claim that they have themselves been injured by the "obscenity" against which they protest), but because some decent person might in some vague way be injured. Or is it some indecent person who might be injured? It is hard to tell. Assemblies are broken up not because they are riotous, but because, who knows, they might become riotous. Offices and cars are searched, not because they are known to contain treasonable pamphlets or cases of liquor, but because treasonable pamphlets may be concealed in offices and cases of liquor may be hidden in cars. The principle is the same throughout. It substitutes fancy for fact. It makes an end of rational legislation. It makes an end of liberty.

The same psychology of fear is responsible for the continual demand for more drastic legislation to meet every new difficulty that arises. When the post-war crime wave was noted (a crime wave being one of the costs always entailed by the luxury of a war), our only method of dealing with it was by the iniquitous Baumes law. Now that the failure of this reversion to Draconian antiquity is admitted by everybody except its author, what shall we do next? Possibly adopt a super-Baumes law, impos-

ing life-imprisonment for the third instead of the fourth offense.

The morning paper brings its daily contribution to social psychology. Today the item happens to concern prison outbreaks. Owing to the intolerable conditions—overcrowding, bad food, unsanitary cells—and, above all, to the reckless imposition of life-sentences leaving the convict no hope, the past year has been marked by prison mutinies in many sections of the country. The one at Auburn, N. Y., was foreseen for several months by the officials, and it takes no great sagacity to foresee others elsewhere. What is the wisdom of the New York legislature in this emergency? I read:

> The legislative bodies at Albany are preparing bills for the return to stripes, shaved heads, and the abolishment of Mutual Welfare leagues. . . . One assemblyman has been quoted as favoring the lash for convicts who attack guards or disobey orders. . . . There is a definite feeling that steps should be taken to make the prisons real prisons and show the convicts that they are there for punishment.

Back to medievalism! Force and more force is the cry. Must every age learn anew the old lesson so calmly summarized by Professor Whitehead: "There is something in the ready use of force which defeats its own object."

That laws should not be upheld at the expense of other laws, particularly when the other laws are more important, is too obvious a logical demand to need discussion were it not that the practice has become widespread and is generally condoned by the courts. It is safe to say that

not a day goes by in which the fundamental law of the land in regard to unwarranted arrests and searches is not violated many times by the police. Violence and even murder, if committed by officers of the government, go unpunished. We are told that we must submit because this is a necessary incident in the enforcement of law. It might better be called an incident in the enforcement of lawlessness. Any possible good obtained through the enforcement of laws involving such vicious measures could not equal the broader evil wrought in the process, for this broader evil is nothing less than the generalization of the spirit of lawlessness. The confusion between (1) the fundamental law, (2) genuinely moral laws, such as those against theft and murder and many others, and (3) experimental enactments of the hour—and the constant subordination of the former to the latter, the greater to the less—has well nigh universalized this spirit. The gang warfare between the prohibition unit and the bootleggers is no less gang warfare because the illegal methods of one party are cloaked in the name of law. The Coal and Iron Police, employed by private corporations in Pennsylvania to break up strikes, is tolerated by the descendants of William Penn. When special groups such as these are suffered to administer the law in their own fashion, it is certain that other groups will be tempted to do the same. Texas bankers, presumably, are no more blood-thirsty than other bankers, yet in January, 1928, the following notice was posted in the 1,500 banks of the state:

$5000 Reward
Dead Bank Robbers Wanted

Not One Cent for 100 Living Ones

The notice proclaimed that there was no limit as to the place of killing—"in the banking-house, as the robber or robbers leave the bank, as they climb into their car, ten or twenty miles down the road as they flee, or while resisting a posse giving chase." Truly a generous offer! Such a notice would have been significant even if posted by the government; put up, apparently, by private individuals, it is a blazing sign of the spirit of the hour.

Again, Mr. Matthew Woll, vice-president of the American Federation of Labor, is, for aught I know to the contrary, a devoted husband and kind father; yet in his semi-official *International Labor News Service* there appeared last fall the following (which the *Nation* called a "veiled incitement to violence"—but surely Mr. Woll's veil is as thin as Salome's):

> In Gastonia some Communists are to be tried for murder. If Americans—or Russians—tried to do in Russia what these Reds tried to do—or threatened to do—in America there would not be any trials. There would be just some quiet shooting.

The mobs of Gastonia were of the same mind as Mr. Woll, and the quiet shooting occurred. Also some very, very quiet trials!

It is not the individual criminal today who is dangerous. He is a nuisance, certainly, but he will not destroy the nation. Group criminals may do so. When people

once accept the thesis that "the lawless element" (as determined by themselves) should be put down lawlessly (by themselves), they have started a process whose logical end is universal destruction. Being essentially illogical, it will hardly go that far, but it has already gone far enough to pervert our national sense of justice and enfeeble our national institutions.

IV. Sops to Optimism

A number of specious excuses are put forward by those who recognize and deplore the present situation but wish to explain away its seriousness. One is told, in the first place, that conditions now, however bad, are really no worse than at any other period. There has never been a time in American history, it is said, when there were not instances of mob rule and violations of free speech. That is perfectly true, but it misses the point. Whereas in former periods violations of liberty, except in the South, were accomplished by lawless groups, today they have become strictly legal; the very ideal of liberty which was formerly cherished is today disowned. There is a fundamental difference between the most imperfect endeavor to achieve a lofty aim and the entire abandonment of that aim.

In the second place, one is told that the present repression is due to "post-war hysteria." At first it was ascribed to simple "war hysteria," but when it continued for ten years after peace had been declared, it was found necessary to adopt the prefix. Soon we shall be speaking of "post-post-war hysteria" and then perhaps of "post-post-

post-war hysteria." Finally we may admit that the hysteria is chronic. An examination of the facts will speedily disprove the contention that the war was responsible for our condition. We did not lose our liberties during the war, we had lost them long before. As I shall show later, they had been slowly sapped and undermined for forty years. It was only because we cared so little about them—our eager attention being riveted upon the growth of wealth, comfort, and national power—that we did not mark their disappearance. As early as 1906 there was one unheeded prophet among us who clearly detected the trend of events. In that year Theodore Schroeder published in the *Arena* his article entitled "Our Vanishing Liberty of the Press," which began:

> For over a century it has been believed that we had abolished rule by divine right, and the accompanying infallibility of officialism, and that we have maintained inviolate the liberty of conscience, of speech, and of press. However, this belief of ours is fast becoming a matter of illusion. Though a love for such liberty is still verbally avowed, yet in every conflict raising an issue over it, it is denied in practice. . . . By gradual encroachments and unconscious piling of precedent upon precedent we are rapidly approaching the stage in which we will enjoy any liberties only by permission, not as a matter of right. In this progressive denial of the freedom of conscience, of speech and press, all three branches of government have transgressed, without seriously disturbing the serene, sweet, century-long slumber into

which we are lulled, by the songs of liberty, whose echoes still resound in our ears, but whose meaning we have long since forgotten.

The stage was already set in 1917; when the curtain rolled up it revealed a group of actors letter perfect in their parts. Since it was not the war that stole away our liberties, naturally peace did not automatically restore them. Those who nurse the pleasing notion that the healing process of time will of itself in some effortless manner dispel the evil passions of the day are cherishing the worst of illusions. The future is as likely to be darker as to be brighter. Only the most determined, persistent, and courageous endeavor can possibly avail to check the present tendencies. Comparison is sometimes made with the British reaction that lasted for nearly forty years after the French Revolution, but then gave way to new and greater triumphs of liberalism. But why make the comparison with England rather than with Rome? When the Romans lost their freedom they were never to regain it, not in forty nor four hundred years. Our destiny looks much more Roman than British. Like Rome in the early days of Augustus the United States is fast becoming an empire while still retaining the form of a republic; like Rome it is fast changing from a democracy to a bureaucracy; like the people of Rome its populace is fast becoming servile, content to be ruled if provided with *panem et circenses*. The grandeur that was Rome may still be ours, but that fairer city of Cecrops with its far higher loyalties to liberty, art, letters, and humane living will have vanished from our ken forever.

Finally, there is the pitiful sop to American optimism offered by the suggestion that, after all, the United States is no worse than some other nations. There is more freedom of speech here, we are proudly told, than in Fascist Italy or Bolshevist Russia. What mighty cause for congratulation! So we now compare ourselves, in matters of liberty, with a Latin monarchy and with the former empire of the Tsars, the one—so far as democratic traditions are concerned—a murdered babe, and the other still unborn. Lincoln, one fancies, might have been surprised and hardly pleased to learn that Americans would so soon be rejoicing that they still possessed more liberty than Italy or Russia. Dare we not at least compare ourselves with Germany, to save the world from whose tyranny we so recently went to war? Or with England or France? No, we dare not. One bit of evidence is conclusive—the mounting tide of American authors and artists seeking refuge in various parts of western Europe. The times have changed since European liberals sought refuge in America. Now it seems to be refuge from America that is sought.

But were it true that the cloud of force-philosophy covered every other land, that would be no reason for accepting it in the United States. I do not think so meanly of my country as many of its defenders seem to do. We had our special mission in the world, with a unique opportunity. Our lamentable failure is far more tragic than that of others; for Americans to have lost their love of liberty is as if the French should lose their love of art or the Germans their love of learning. Worship of power can be far more dangerous here than in Germany or

Italy, because there is so much more power which the worshiper may obtain. America can perhaps, with difficulty, still be, as she has been, on the whole, a blessing to the world, or she can easily become the greatest curse the world has ever seen. The next few years will probably decide the question.

Many assertions in this chapter, some one may say, and little or no proof. Patience, the proof will follow. After examining it, in all its grotesque and hideous detail, we may return to the question of what hope remains. If hope there be, however grim, in the face of all the facts, I venture to think it will be more desirable than any cheap optimism predicated on denial of these facts.

CHAPTER II

The United States vs. The Spirit of '76

Driven from every other corner of the earth, freedom of thought and the right of private judgment in matters of conscience direct their course to this happy country as their last asylum.

—Samuel Adams

Men fight for liberty and win it with hard knocks.
Their children, brought up easy, let it slip away again, poor fools.
And their grandchildren are once more slaves.

—D. H. Lawrence

Illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of procedure.

—Mr. Justice Bradley

Whatsoever sentence the magistrate gives, the judgment is the Lord's, though he do it not by any rule prescribed by civil authority.

—John Winthrop

What is this you bring my America?

—Walt Whitman

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CHAPTER II

The United States vs. The Spirit of '76

I. The Philosophy of '76

The United States is unique among the great nations of the earth in having been founded on the basis of an avowed ideal. Greece and Rome, India, China, and Japan, and all the peoples of modern Europe developed their unity in another and more natural way by slow growth through centuries. The United States sprang into being like Minerva, armed and conscious. Here alone was something like the original "Social Contract" of which Locke and Rousseau had dreamed: that primitive voluntary compact of individuals from which society was fancied to have sprung and from which it was supposed to derive its sanction. To be sure, the analogy was imperfect in that the inhabitants of the various Colonies were already members of society with a long tradition of English law behind them. Nevertheless, it was sufficiently close to be striking. And in the essential features there was identity between the ideal contract and the actuality: the Colonists of their own free choice organized themselves into a nation for the achievement of a definite purpose. This undertaking, on the scale on which it was now

attempted, was something new in history. That the Colonists themselves were quite aware of the significance of their act is shown by the speech of Samuel Adams in Philadelphia, August 1, 1776, twenty-seven days after the Declaration of Independence.

> Other nations have received their laws from conquerors; some are indebted for a constitution to the sufferings of their ancestors through revolving centuries; the people of this country alone have formally and deliberately chosen a government for themselves, and, with open, uninfluenced consent, bound themselves into a social compact.

The greatness of the Declaration of Independence lay, not in any originality of thought on Jefferson's part—which would have destroyed its value as a representative document—but in its superb phrasing of a common ideal. The petulant remarks of John Adams, written in 1822 long after he had become estranged from Jefferson, are excellent evidence that the Declaration really expressed the spirit of the people.

> There is not an idea in it but what had been hackneyed in Congress for two years before. The substance of it is contained in the declaration of rights and the violation of those rights, in the Journals of Congress, in 1774. Indeed, the essence of it is contained in a pamphlet, voted and printed by the town of Boston, before the first Congress met, composed by James Otis, as I suppose, in one of his lucid intervals, and pruned and polished by Samuel Adams.

In the Declaration of Independence, Jefferson set forth the liberal philosophy of his day—but not of his day alone. It was the direct product of the political thinking of nearly two centuries, running through Grotius, Pufendorf, Hooker, Locke, Beccaria, Burlamaqui, Montesquieu and many others. Locke's classic definition of natural equality was accepted by all the American leaders: "The equal right which every man has to his natural freedom without being subject to the will and authority of any other man." English translations of Beccaria's *Crimes and Punishments* and Burlamaqui's *Natural Law* circulated widely in the Colonies. The philosophy of liberty has never been expressed more trenchantly than by the former, who said "Every act of authority of one man over another for which there is not absolute necessity is tyrannical." And Burlamaqui convincingly derived the right to freedom from the intrinsic nature of man:

> The only way to attain to the knowledge of that natural law is to consider attentively the nature and constitution of man, the relations he has to the beings that surround him, and the states from thence resulting. In fact, the very term of natural law and the notion we have given of it, show that the principles of this science must be taken from the very nature and constitution of man.

"The hinge whereon the whole system of humanity turns," Burlamaqui further wrote, is that "The human understanding is naturally right, and has within itself a strength sufficient to arrive at the knowledge of truth, and to distinguish it from error."

The ideas connected with the theory of natural rights were so familiar to the leading thinkers of Jefferson's time, as to Jefferson himself, that it seemed to them self-evident that the individual man possessed a nature of his own, entailing the right to its development, quite apart from organized government. Born with the pursuit of happiness already in his veins, he owed his body with its desires, his brain with its thoughts, his tongue with its speech, his limbs with their movements, life itself,—all these he owed to nature and to nature's God, not to any government. Hence his inalienable rights to "life, liberty, and the pursuit of happiness"—rights intrinsic to his very being as a man. These natural rights, however, are precariously maintained in a state of nature; they can easily be taken from any individual by a stronger individual. Therefore groups arise, and ultimately governments. "To secure these rights," wrote Jefferson, "Governments are instituted among men, deriving their just powers from the consent of the governed." Government is not the bestower of rights, but the receiver. It is a means, not an end. Obviously, if any government fails to fulfill the end for which it was created, it may and should be discarded. The right of revolution follows necessarily from the rest of the argument.

Thus in founding the American nation, Jefferson and his fellows were basing it not upon anything peculiarly American, but upon the rights of man *per se*. They would have scorned the notion of a separate kind of American liberty distinct from human liberty. It was for this reason that the United States at its inception and for many years was greeted so warmly by generous spirits every-

where. The first of the nations entirely to overthrow feudal privilege, it was looked upon as the advance hope of developing humanity. So it was toasted by Robert Burns and hymned by William Blake, so it was hailed alike by Wordsworth, Moore, Byron, and Shelley. Liberty was, and was understood to be, its *raison d'être.*

Of recent years, much attention has been given to the economic motives involved in the American Revolution; it proves to have been, like other wars, largely a commercial struggle. From this, single-track minds have leaped to the conclusion that its was a sham idealism; that Jefferson and the rest, in their high words upholding human rights, either did not know or did not care what they were talking about. The assumption of the single-track mind is that if a man has property interests he cannot be freely interested in anything else—an assumption demonstrably false throughout the whole of human history. According to it, Greek architecture, sculpture, drama, and philosophy would have expressed merely the "ideology" of a propertied class; so with the art of Medievalism; so with that of the Renaissance. The diversity of the results disproves at once this assumption of one universal cause. Economic motive is usually present, among other motives, in all activities, thinking included; but economic motive is irrelevant in thinking unless it distorts conclusions reached on other grounds.

Much has also been made of actual violations of liberty by the colonists. It is true that among the patriots were many of those whom Jean de Crèvecœur described as "perpetually bawling about liberty without knowing what it was." During the period of confusion attendant

upon the course of the Revolution, instances of mob spirit were not infrequent. Persecution of Loyalists and Quakers occurred. The war adage, "He who is not with me is against me," was heard in many forms on many lips. Nevertheless, as Leon Whipple points out in his *Story of Civil Liberty in the United States*, "The Revolutionary mobs were . . . surprisingly humane and orderly." Nowhere, even during the excitement of the war, was there anything approaching the brutal and sadistic spirit shown by our San Diego vigilantes in the peaceful days of 1912.

Again, it has been pointed out that when "the consent of the governed" was declared to be essential in a just society, no such entire consent existed in the Colonies, where voting was everywhere restricted by property rights. And it has been emphasized that the phrase in the Declaration, "All men are created . . . equal," tacitly excluded from the human race both slaves and women (a rather large exclusion, not to be condoned on the score that the issue had never been raised, as Mrs. Abigail Adams was even then writing to John Adams suggesting equal rights for women, only to be complacently rebuked by her amused husband). Nevertheless, the final answer to all such cavilings was given by Abraham Lincoln long ago in his speech at Springfield, Ill., June 26, 1857:

> I think that the authors of that notable instrument intended to include all men, but that they did not intend to declare all men equal in all respects. They did not mean to say that all were equal in color, size, intellect, moral development, or social capacity. They

> defined with tolerable distinctness in what respects they did consider all men created equal—equal in certain inalienable rights, among which are life, liberty, and the pursuit of happiness. This they said, and this they meant. They did not mean to assert the obvious untruth, that all men were then actually enjoying that equality, nor yet that they were about to confer it upon them. In fact, they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society which should be familiar to all and revered by all—constantly looked to, constantly labored for, and even, though never perfectly attained, constantly approximated; and thereby constantly spreading and deepening its influence and augmenting the happiness and value of life to all people, of all colors, everywhere.

A more positive error is to read back the later division between Federalists and Republicans into the Revolutionary period and assume that Jefferson was at that time only the leader of a group. Those who were later to become prominent in the Federalist party were as firm believers in the doctrine of natural rights as Jefferson himself. Thus Alexander Hamilton:

> The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written as with a sunbeam in the whole volume of human nature, by the hand of the Divinity

itself and can never be erased or obscured by mortal power.

Thus John Adams:

> The very definition of a freeman is one who is bound by no law to which he has not consented.

Thus Mr. Justice Wilson of the United States Supreme Court:

> No exterior human authority can bind a free and independent man. . . . The consent of those whose obedience the law requires . . . I conceive to be the true origin of the obligation of human laws . . . [The right of revolution] should be taught as a principle of the Constitution of the United States and of every state in the Union.

Thus even Sir William Blackstone, ancestor of all the Federalists:

> This law of nature, being co-eval with mankind and dictated by God himself, is, of course, superior to any other. It is binding all over the globe, in all countries and at all times; no human laws are of any validity if contrary to this; and such of them as are valid derive all their force and all of their validity mediately or immediately from this original.

Thus the state of Massachusetts, the future headquarters of Federalism, in its Constitution of 1780:

> The end of the institution, maintenance, and administration of government is to secure the existence

of the body politic, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life.

Thus, finally, the last of the Federalists, John Quincy Adams:

> So long as this planet shall be inhabited by human beings, so long as man shall be of social nature, so long as government shall be necessary to the great purposes of society, so long as it shall be abused to the purposes of oppression—so long shall this Declaration hold out to the sovereign and to the subject the extent and boundaries of their respective rights and duties, founded in the laws of nature and of nature's God.

II. Jefferson a Descendant of Socrates

The fashion in recent times is to sneer at the doctrine of natural rights as the creation of "eighteenth-century individualism." Hence it is necessary to reiterate that the conception was of no such local origin. It was not a temporary aberration of the eighteenth century; the denial of it in the twentieth century is the aberration. Far from being the creation of a particular period, it was the fruit of more than a millennium of human effort. Although given final definition by the Protestant thinkers mentioned in the previous section, the theory of natural rights went back through St. Thomas Aquinas, St. Augustine, and the Stoics to Aristotle, Plato, and Socrates.

"All discussion of the relation of law to morals, of the relation of jurisprudence to ethics," writes Roscoe Pound, "goes back to the Greek thinkers of the fifth century before Christ, who enquired whether the right or the just was right and just by nature or only by convention and enactment." If the former, then there is a standard above the law by which the law itself can be judged; if the latter, the law itself is the standard, and behind it is nothing but force. The second thesis was maintained by the Sophists with the same zeal that we shall find displayed on its behalf by political thinkers of the present day. Government, the Sophists argued, is always in the hands of those who by means of physical strength, wealth, or cunning possess the power to control it. Government among men is merely a more complicated instance of the sort of thing that exists in a society of wolves. Against the Sophists, Socrates attempted to find the basis of law, not in the brutal but in the rational part of man's nature. As a matter of fact, men are not always wolves, he argued; they possess the faculty of reason and through mutual discussion may reach general agreement and the adoption of measures aimed to promote the common well-being. The sanction of government, he maintained, lies not in the power behind it, but in the wisdom and goodness behind it.

The Athenians at last silenced his arguments, when he was eighty years old, by condemning him to death. "We will show you," they said in effect, "whether or no we are wolves." During the trial Socrates, at least as reported by Plato, gallantly defied his judges in the first great speech in defense of human liberty:

> If in acquitting me you should say: "We will not put faith this time, O Socrates, in your accusers, but will let you go, on the condition, however, that you no longer spend your time in this search nor in the pursuit of wisdom, and that if you are caught doing either again you shall die"—if, I say, you were to release me on these conditions, I should say to you: "Athenians, I love and cherish you, but shall obey the God rather than you; and as long as I draw breath and have the strength, I shall never cease to follow philosophy and to exhort and persuade any one of you whom I happen to meet. For this, be assured, the God commands; and I believe that there has never been a greater good in the state than this my service to the God; for I do nothing but go about persuading you, both young and old, not to let your first thought be for your body or your possessions, nor to care for anything so earnestly as for your soul." And, Athenians, I should go on to say: "Either hearken to my accusers or not; but understand that I shall never act differently, even if I have to die for it. . . .

It will be observed that in addition to his defense of the right of free thought and discussion Socrates incidentally asserts its expediency: "And I believe that there has never been a greater good in the state than this my service to the God." In regard to these two points, it may be well to quote here the remarks of J. B. Bury in his *History of Freedom of Thought* (1913), as they perfectly

illustrate a contemporary attitude to which we shall have occasion to return later:

> Thus in what we may call the earliest justification of liberty of thought we have two significant claims affirmed: the indefeasible right of the conscience of the individual—a claim on which later struggles for liberty were to turn; and the social importance of discussion and criticism. The former claim is not based on argument but on intuition; it rests in fact on the assumption of some sort of superhuman moral principle, and to those who, not having the same personal experience as Socrates, reject this assumption, his pleading does not carry weight. The second claim, after the experience of more than 2000 years, can be formulated more comprehensively now with bearings of which he did not dream.

Professor Bury wrote just before the World War. His book reflects the delusions of generous spirits at that time. While recognizing the possibility of decadence, he believed with most liberals that the fight was actually won.

> The struggle of reason against authority has ended in what appears now to be a decisive victory for liberty. In the most civilized and progressive countries freedom of discussion is recognized as a fundamental principle.

Today, the experience of less than twenty years is sufficient to open one's eyes to the folly of basing the argument for liberty solely on its social importance. The

social value of discussion and criticism is indeed overwhelmingly great, but this value rests wholly on the fact that society is actually made up of individuals with separate minds; once let the right of the individual conscience be denied, and you will soon see how long freedom of discussion and criticism will be permitted on the ground of their expediency. It will always be found expedient that one man shall die for the whole people.

Socrates may or may not have been a mystic, but his assertion of individual liberty, far from resting on an experience peculiar to himself, was based by implication on an elementary psychological fact verifiable every moment by Mr. Bury or any one else. This is the fact that each man, in the last analysis, has only his own mind to do his thinking with. Every belief is a belief in somebody's mind; every choice is a choice made by somebody. The responsibility for individual thinking and choosing is something that we cannot escape; it is forced upon us by the fact of individual consciousness. "The heart of another is a dark forest," says the Russian proverb. The ideas of others, reaching us indirectly through their words or deeds, we have to interpret as best we may by the light of our own reason. Even if we decide to accept, on every conceivable point, some external authority, that initial decision is still ours. This is recognized by the most authoritarian of institutions, the Catholic Church, which ultimately bases its claims on the consent of the individual reason. "Examine the evidence," it says, "and you will see that our claims are justified."

From the fact of freedom of thought—given by nature

—follows the right to freedom of speech. Suppression of speech will make one's thoughts dwarfed and barren, but it does not magically kill them; it merely forces—or tries to force—one to be a hypocrite in his expressions. Demand for freedom of speech is simply the initial moral demand to be permitted to live an honest life. That Socrates was not resting his defense on the weak grounds of a private mystical experience is shown by the conduct which he was defending—a life spent in striving to arouse the critical reason of his hearers to an examination of the basis of their beliefs. His delight in argument showed his faith in the ability of the unshackled mind to attain the truth. To follow fearlessly wherever the argument may lead is the first demand of honest inquiry. Socrates was not defending himself alone, but every seeker of the truth who should come after him. The god to whom he appealed over the heads of his contemporaries was the spirit of reason smiling upon the free pursuit of wisdom.

Not in the individualistic eighteenth century but in highly socialized Athens was the natural right to freedom of speech first asserted, and generally exercised. The condemnation of Socrates was a notable exception to the customary Greek practice; it occurred at a time of great public strain and behind it, as modern historians have shown, were unusually malevolent political motives. In the entire history of Greece there were probably fewer cases of suppression of freedom of speech than could be found in a single latter year of these United States established in the name of freedom. Again to quote J. B. Bury —this time with entire agreement:

> If we review the history of classical antiquity as a whole, we may almost say that freedom of thought was like the air men breathed. . . . The educated Greeks were tolerant because they were friends of reason and did not set up any authority to overrule reason.

Thomas Jefferson, the most open-minded of all the American revolutionists, who said, "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors," stood firm-footed on a well-trodden path that led back to Socrates.

III. In the Days of Tocqueville

Two generations passed, and the American people saw no change in themselves unless perhaps they seemed even more than ever passionately devoted to liberty. In the national anthem, written during the War of 1812, Francis Scott Key could find no more fitting description of his country than "the land of the free and the home of the brave." "America," written by Dr. S. F. Smith in 1832, reëchoed this description in nearly every stanza. The surge of westward expansion had established a series of new states and territories in which the conditions of life were far freer than they ever were in the Atlantic colonies. Property requirements for voting had been removed and universal manhood suffrage established, except in the case of slaves. Meanwhile, the injustice of slavery itself was being more and more discussed. All sorts of utopias were in the air. Communistic enterprises sprang

up like mushrooms—Brook Farm, Fruitlands, Hopedale, and many others. The absolutely ascetic Shakers and the Oneida community with its practices of bundling and experimental marriage were long tolerated equally. In New England there was a prominent Non-Resistance Society, headed by William Lloyd Garrison, whose members refused to acknowledge allegiance to any human government. The leading writer of the day, Ralph Waldo Emerson, was virtually a philosophical anarchist. Surely Americans were still walking on the open road.

Nevertheless, a certain philosophical Frenchman, Alexis de Tocqueville, who had recently spent nearly a year in the United States, studying the national character and institutions, was not convinced. In a remarkably dispassionate work, *Democracy in America* (1835), he voiced, along with much approval, many a sagacious doubt.

> In my opinion the main evil of the present democratic institutions of the United States does not arise, as is often asserted in Europe, from their weakness, but from their overpowering strength; and I am not so much alarmed at the excessive liberty which reigns in that country, as at the very inadequate securities which exist against tyranny. . . . When an individual or a party is wronged in the United States to whom can he apply for redress? If to public opinion, public opinion constitutes the majority; if to the legislature, it represents the majority, and implicitly obeys its injunctions; if to the executive power, it is appointed by the majority and remains a passive tool in its hands; the public troops consist of the majority under

> arms; the jury is the majority invested with the right of hearing judicial cases; and in certain states even the judges are elected by the majority. . . . I do not say that tyrannical abuses frequently occur in America at the present day; but I maintain that no sure barrier is established against them.

Faith in the divine right of the majority was beginning to supplant the earlier faith in individual liberty. In fact, the two ideas, utterly different in essence, were already tending to become so confused in the popular mind that the average American, if asked to define "liberty," would have been likely to reply "the will of the majority." Had Tocqueville prolonged his stay in America for a few more years he could not have said that tyrannical abuses were infrequent. The decade in which he wrote saw the first appearance of the American mob in full force. It witnessed the pogroms against the Mormons in Missouri and Illinois, the sacking of the Ursuline Convent at Charlestown, Mass., the mobbing of Abolitionists in many places, the burning of Pennsylvania Hall in Philadelphia, the murder of Elijah Lovejoy at Alton, Ill. Then, sated with the blood of the martyrs—or because the Mormons departed to the far West and the Abolitionists became too numerous to be attacked—the many-headed beast retired to its lair. Back of the outrages lay mingled economic and religious motives, and, as we shall see later, a new psychology bred by slavery in the South and threatening through the power of Southern influence at this time to engulf the nation. Evidently, the danger of majority tyranny is greater, the greater the uniformity of

the community. Thus, in the South, which after 1830 was practically united in the defense of slavery, there was less freedom of speech than in the more diversified North. But even in the North, Tocqueville noted a distressing uniformity.

> In that immense crowd which throngs the avenues to power in the United States, I found very few men who displayed any of that manly candour, and that masculine independence of opinion which frequently distinguished the Americans in former times, and which constitutes the leading feature in distinguished characters wheresoever they may be found. It seems, at first sight, as if all the minds of the Americans were formed upon one model, so accurately do they correspond in their manner of judging.

Not satisfied with studying his contemporaries and their immediate Revolutionary ancestors Tocqueville delved in old Colonial records and marveled much at the quaint legal code of Connecticut in 1650:

> The chief care of the legislators, in this body of penal laws, was the maintenance of orderly conduct and good morals in the community: they constantly invaded the domain of conscience, and there was scarcely a sin which was not subject to magisterial censure. The reader is aware of the rigour with which these laws punished rape and adultery; intercourse between unmarried persons was likewise severely repressed. The judge was empowered to inflict a

> pecuniary penalty, a whipping or marriage on the misdemeanants. . . . We find a sentence bearing date the 1st of May 1660, inflicting a fine and reprimand on a young woman who was accused of using improper language and of allowing herself to be kissed. The Code of 1650 abounds in preventive measures. It punishes idleness and drunkenness with severity. Innkeepers are forbidden to furnish more than a certain quantity of liquor to each consumer; and simple lying, whenever it may be injurious, is checked by a fine or a flogging. In other places, the legislator, entirely forgetting the great principles of religious toleration which he had himself upheld in Europe, renders attendance on divine service compulsory, and goes so far as to visit with severe punishment, and even with death, the Christians who chose to worship God according to a ritual differing from his own. Sometimes, indeed, the zeal of his enactments induces him to descend to the most frivolous particulars: thus a law is to be found in the same code which prohibits the use of tobacco. It must not be forgotten that these fantastical and vexatious laws were not imposed by authority, but that they were freely voted by all the persons interested, and that the manners of the community were even more austere and more puritanical than the laws.

Who can fail to see the connection between our own frivolous, fantastical, and vexatious legislation and this old inquisitorial spirit lingering on like a latent disease for well-nigh three centuries? Arrested but unextirpated

by either eighteenth-century rationalism or nineteenth-century romanticism, immune to culture, it slept beneath the surface of all the dull minds in the country, ready to reawaken whenever the national organism should be subjected to sufficient shock. But there is at least one notable difference between today and 1660—assuming, what is more than doubtful, that Tocqueville's interpretation of 1660 was entirely correct. Who could say that the manners of the twentieth century are more austere and puritanical than the laws? The very opposite is so evident that such laws might be dismissed, after the fashion of too many liberals, as a mere temporary nuisance committed in the cellars of the court-house, were it not that the cellars of a court-house are the finest possible breeding-places of social disease. Here once more the prophetic spirit of Tocqueville scanned the future:

> American functionaries are . . . much more independent in the sphere of action which the law traces out for them than any public officer in Europe. . . . In New England, for instance, the selectmen of each township are bound to draw up the list of persons who are to serve on the Jury; the only rule which is laid down to guide them in their choice is that they are to select citizens possessing the elective franchise and enjoying a fair reputation. In France the lives and liberties of the subjects would be thought to be in danger, if a public officer of any kind was entrusted with so formidable a right. In New England the same magistrates are empowered to post the names of habitual drunkards in public-houses, and

to prohibit the inhabitants of a town from supplying them with liquor. A censorial power of this excessive kind would be revolting to the population of the most absolute monarchies; here, however, it is submitted to without difficulty. . . . By this means habits are formed in the heart of a free country which may some day prove fatal to its liberties.

The formation of habits of majority tyranny, uniformity, censorship, and permission of arbitrary powers to local magistrates—such were the dangerous tendencies which Tocqueville saw beneath the fair surface of American society even in 1835.

IV. The Triumph of Calhoun

On the main issue of the mid-century, that of slavery, it would seem that the North, at least, after some wavering, kept faith with the national ideal. Had Jefferson's denunciation of slavery not been stricken from the Declaration of Independence by the Continental Congress, it is conceivable that the Civil War need never have been fought. Even without that passage, the incongruity between the national profession of faith and the retention of slavery was too glaring to remain tolerable. Moses Coit Tyler is probably quite correct in his statement of the influence of the Declaration:

> Had it not been for the inviolable sacredness given by it to those sweeping aphorisms about the natural rights of man, it may be doubted whether Calhoun might not have won over an immense majority of

the American people to the support of his compact and plausible scheme for making slavery the basis of the Republic. It was the preamble of the Declaration of Independence which elected Lincoln, which sent forth the Emancipation Proclamation, which gave victory to Grant, which ratified the Thirteenth Amendment.

Certainly the leaders of the North, Lincoln, Seward, and Chase, had no doubts of the source of their allegiance. They based their arguments on the theory of natural rights just as the Revolutionists had done. But, through no fault of theirs, the issue was now tragically complicated.

The Blue and the Grey went to war with the same word "Freedom" on their lips. But it meant quite different things in the North and in the South. Determined at all costs to defend the institution of slavery, the assumed necessary basis of its economic life, the South had long since disembarrassed itself of the theory of natural rights. Under the able leadership of the landholding aristocracy, a mood of solidarity had developed for which the ideal of freedom was social, not individual. It was the evil fortune of the South to have as the exponent of this new ideal one of the most powerful minds in all the rising race of modern Sophists—the great Calhoun. Brilliant, subtle, and original, intellectually unscrupulous —with the type of thought usually called logical because it reasons convincingly from ultimately unexamined premises—Calhoun subjected the idea of natural rights to constant ridicule. He sneered at Jefferson and the

Declaration of Independence: men are not born free and equal, he scoffed, because men are not born at all: infants, not men, are born. The idealism of the Revolutionists, he argued, was at war with history.

> There has never yet existed a wealthy and civilized society in which one portion of the community did not, in point of fact, live on the labor of the other.

Well enough for the Greeks to allow liberty among freemen, but this liberty and all the culture of Athens were raised upon the economic foundation of slavery. Medieval cathedrals might point to heaven, but they towered above a land of mingled castles and hovels. Freedom is not a natural right, but a reward voluntarily or involuntarily bestowed by society on mental and moral development, combined, Calhoun was fain to admit, "with favorable circumstances." Yet even these latter apparently accidental factors are really a reward of some one's merit; one cannot be well born without good ancestors, and inherited wealth must have been first acquired by enterprise or frugal habit. Not equality but inequality is the law of nature and morality.

Thus were the admitted inequalities of men used to deny the fundamental common characteristics of humanity. Thus were the admitted imperfections of society used as an argument for their continuance.

But if the theory of natural rights was disowned in the South, its corollary, the social-contract theory of government, was too serviceable to be abandoned. The Southern states, as sovereign bodies, had entered the Union of their own free will; why, then, had they not the

right to leave it of their own free will? There was not a word in the Constitution to forbid it. On the question of secession the South had all the better of the argument. Had it not been for the hotheads in South Carolina who insisted on beginning a war, it is quite possible that the general sentiment in the North might have come to be that of Horace Greeley, to "let the erring sisters go in peace." What, in that case, the final result would have been, of course, no one can know, but it seems reasonable to suppose that as slavery gradually proved economically unprofitable it would have been abandoned, and that eventually there would have been a voluntary reunion of the two sections. At any rate, we should have been spared a materially ruined South and a spiritually ruined North.

The Civil War cut across American history like a knife, but it churned the American mind like a triple screw. It confused all the issues. Each party was bound to be defeated by its own inner spiritual diremption. The South was defending liberty—and slavery. The North was imposing freedom by invasion and conquest. The appeal to force naturally continued long after the cessation of avowed hostilities. The South, virtually compelled to accept the Thirteenth Amendment, took speedy steps to nullify it so far as possible. The North, angered that all the efforts of the war should have borne so little fruit, after some further legislation embarked upon its fatal Reconstruction policy. The horrors of the ensuing decade are familiar to every student of history: the white terror of the carpet-baggers met by the red terror of the Ku Klux Klan, with the Negro the chief victim of it all.

Eventually the North withdrew, leaving the South to solve the problem in its own way, by lynch law or otherwise. Decidedly, the policy of coercion had not proved an unqualified success.

Nevertheless, the victory of the North on the field of battle tended to sanctify that policy in the minds of the American people. The "right" of the majority to coerce a recalcitrant minority was henceforth established. When, a little later, the Mormons in Utah desired to secede from the Union and form the separate state of Deseret, there was not the slightest chance of their being permitted to do so. The nation formed by the seceding British colonies would permit no secession in its turn. When the principle was accepted that the majority had the right to force a minority to remain in the Union even though it desired to leave, the right to force a minority to leave, though it desired to remain, and the right to exclude it, though it desired to enter, would follow logically and actually. In fact, these rights would come to be so cherished that there would be a disposition to enforce them on the slightest occasion, particularly if pecuniary profit were even distantly involved. America, the friend of the outcast, the generous host of the world's wanderers, perished in the Civil War, to be succeeded by a jealous old beldame intent on guarding her silver spoons from theft.

For silver spoons soon became our chief concern. So paradoxical were the results of the Civil War that at the very moment when they seemed to give complete countenance to the theory of majority rule they were preparing a more dangerous minority than the country had ever seen. The victory of the North meant the triumph of

an industrial class about to possess a political power far beyond the dreams of the most ambitious slave-owner. The objective achievements of Northern industry during the next twenty-five years were such as to dazzle and hypnotise all minds disillusioned, as almost all minds then were, with the perplexing problems of human liberty. The development of the national resources came to be looked upon as the chief duty of the national government, and this led to an alliance more and more avowed with the power of capital actually in charge of such development. The alliance raised the prestige of both industry and government to hitherto unheard-of heights. The South of Calhoun had died, but his philosophy lived on. Being essentially a philosophy of power, it belonged even more to the rising aristocracy of industry than to the vanquished aristocracy of slavery.

V. Varieties of Power Philosophy

> There never was, and there never can be any liberty upon this earth and among human beings, outside of state organization. . . . The state is the source of individual liberty.—John W. Burgess, *Political Science and Comparative Constitutional Law* (1890).
>
> That the state is a separate entity is a mere fiction of law. . . . By getting behind the fiction, to view the naked fact, we discover that the state has no existence except as a few fallible office-holders, theoretically representing the public sentiment, expressing its power, sometimes doing good and often thriving on the ignorance and indifference of the masses.—

THEODORE SCHROEDER, *Free Speech for Radicals* (1916).

The development of power thinking in America received great assistance from each of the two most influential nineteenth-century philosophies of Europe, the idealistic system of Friedrich Hegel, and the realistic system of Herbert Spencer, which, although utterly opposed in origin, method, and superficial results—the one socialistic, the other individualistic—came to similar conclusions on the vital issue of the identity between might and right. Hegel exalted the state, Spencer exalted private industry; each lent increment to the American alliance of the two.

Hegel, the greatest of all the modern Sophists, refused to admit even the existence of the private individual. As thought involves both a thinker and a thing thought about, so throughout the universe runs the mutual involution of subject and object, which, politically, takes the form of the relation between the individual and society. Neither considered separately is wholly real; each is but part of a more ultimate whole, the state. Enormously learned, an extraordinarily adept psychologist, a master of verbal dialectic, Hegel reared the most externally imposing edifice of thought since Aquinas. Special wings were devoted to history of philosophy and philosophy of history, to religion, to art, to science, to politics, to ethics, to logic, to metaphysic. His work was like a great modern American hotel where all one's wants can be supplied beneath a single roof. But, like the hotel, it was built for transients only.

The sophistry at the root of the Hegelian dialectic is its equation of essentially disparate objects. The thinker and his thoughts are not beings of the same kind; destroy the thinker and all his thoughts vanish; destroy his thoughts and he may still think new ones. Similarly with the individual and society. The individual exists and other individuals exist, but "society" is nothing more than the name for their collective activities. To entertain the notion that a collection of individuals somehow obtains a real being apart from that of the individuals who compose it is to fool oneself with words. Nevertheless, such Hegelian folly is difficult to avoid. The overwhelming convenience of such collective words as "people," "race," "nation," "society," "state," like the overwhelming convenience of coins, leads one constantly to forget that both words and coins, in the last analysis, possess only an imputed value. This tendency is enhanced by the high moral attributes which these collective words often manage to purloin. Being but words, or, at best, ideas, they seem to move on an ideal plane, free from physical ailments. An "army" may be victorious or defeated, but it does not feel pain, cold, hunger, cooties, or any of the other vulgar ills from some one of which every soldier may be suffering. Just so, individual legislators and executives are recognized to be often foolish or corrupt, and we are still permitted, sometimes, to refer to the fact, but "the government" composed of these very men is deemed incapable of error. The attempt, however, to conjure divinity out of words gives us, naturally, only a verbal divinity. We started with human beings and we end with human beings—although possibly with a more be-

fogged set of human beings than we had at the beginning.

Hegel ought to have been a pan-optimist. "The real is the rational," he was fond of saying. But the self-unfolding of the rational Absolute which he traced through western history actually ended for him with the establishment of the Prussian state, the highest form of reality given to mortal eyes to see. His philosophy was soon rejected by subsequent philosophers of his native land, but it was impressively perpetuated in the flesh when Prussia became the head of the German Empire. American students thronging to Germany between 1870 and 1900 returned enthusiastic over the orderliness, the efficiency, and the apparent high regard for arts and letters displayed by the imperial government. They were in a mood to welcome Hegelianism, which had been already introduced in the 'sixties by Henry Brokmeyer, who had taught it to an admiring group of disciples in St. Louis —a group which at first had the novel idea of making that city "the Athens of America," but later broke up and scattered their Athenian efforts more widely. Through one among them, William Torrey Harris, editor of the *Journal of Speculative Philosophy* and later United States Commissioner of Education, the movement obtained an influence greater than had been that of any other philosophical group since the Transcendentalists; reënforced from Oxford, where it had become dominant, Hegelianism became the reigning philosophy in American colleges by the end of the century. The effect was to develop an "organic" theory of society best seen in the most influential sociological work of the period,

Political Science and Comparative Constitutional Law (1890) by John W. Burgess. This work popularized among American sociologists and historians the concept that liberty is dependent upon the degree of civilization. The Teutonic nations, as the carriers of the highest civilization, have the duty thrust upon them, to civilize, by force if need be, all the rest of the world. Let not weaker nations complain of any injustice in this. The action of the God-sent Teutonic group "violates no rights of these populations which are not petty and trifling in comparison with its transcendental right and duty to establish political and legal order everywhere." Here we have the philosophy of imperialism worked out in theory eight years before the Republican party began to work it out in practice. The Philippines had been annexed in principle before Dewey ever saw Manila Bay.

It was an evil fate which left the defense of liberalism at this juncture in the hands of Herbert Spencer. Although a spiritual descendant in many ways of Bentham and the Mills, Spencer had reared his philosophy on the concept of force. Accepting the mechanistic interpretation of nature common in the physics and biology of his day, he sought to explain human evolution wholly in terms of the struggle for survival. Toward this struggle he assumed an attitude of unctious reverence:

> The well-being of existing humanity, and the unfolding of it into this ultimate perfection, are both secured by that same beneficent, though severe, discipline, to which the animal creation at large is subject: a discipline which is pitiless in the working out

> of good: a felicity-pursuing law which never swerves for the avoidance of partial and temporary suffering. The poverty of the incapable, the distresses that come upon the imprudent, the starvation of the idle, and those shoulderings aside of the weak by the strong, which leave so many in shallows and misery, are the decrees of a large, farseeing benevolence.

With this religious faith in natural selection, Spencer fought all police legislation imposing restraint upon individual economic enterprise in the interest of the common welfare, no matter how slight the restraint or how indubitable the good to be procured. The practical result of his teachings was to dwarf the doctrine of natural rights into a defense of the natural right of property, in which convenient form, as we shall see, it was eagerly asserted by the Supreme Court of the United States. The materialism of Spencer—for, despite his ontological denials, his system was materialistic in essence and outcome—afforded little better basis for liberty than did Hegel's idealism. If thinking be regarded as any less "natural" than other activities of nature or any less an expression of its intrinsic character, and if the chief merit of thinking is supposed to be that it short-cuts the way to power, then it is idle to talk of natural or any other rights.

Finally, under the combined influences of the century, there developed the "Analytical School" of juristic thinkers, who succeeded in popularizing a conception of the law that incorporated nearly all the fallacies of the period. This conception was, fundamentally, a return to the primitive pre-philosophical notion that law is solely by

enactment and custom. Thus Brooks Adams's *Centralization and the Law* (1906) asserts:

> In the abstract, right and justice, as something beyond social convenience or, if you please, class advantage, are figments of the imagination. What you have, as a scientific fact, is an automatic conflict of forces reaching, along the paths of least resistance, a result favorable to the dominant energy.

Thus James Coolidge Carter's *Law, Its Origin, Growth and Function* (1907) proclaims:

> Customs . . . are the unerring evidence of common thought and belief. . . . In the enforcement of a rule thus formed no one can complain, for it is the only rule which can be framed which gives equal expression to the voice of each. . . .

If it happens to be the custom of the community in which one lives to silence all hostile criticism, the "voice" of the individual so silenced still finds "expression" in some mystical way—perhaps through his sour face. He still retains his freedom; he has full liberty to be silent. As Roscoe Pound writes in his *Law and Morals* (1923):

> We are back to the state as the unchallengeable authority behind legal precepts. The state takes the place of Jehovah handing the tables of the law to Moses, or Manu dictating the sacred law, or the Sun-god handing the code to Hammurabi. Law is by convention and enactment—the proposition, plausibly maintained by sophists, which led Greek philos-

ophers to seek some basis that made a stronger appeal to men to uphold the legal order and the security of social institutions.

VI. Abandon Hope, All Ye Who Enter Here

A nation's practice does not always coincide with its theories, but during the period under discussion the two tended to harmonize. Liberty and the desire for liberty declined together. The generation after the Civil War saw the establishment of Comstockery, the rise of Prohibition, the formation of "patriotic" societies, and the development of imperialism. But as each of these raised special problems, their discussion will be postponed. In the remainder of this chapter it is proposed to deal with only those more general and glaring infringements of personal liberty which, multiplying with the advancing years, had already become a national habit by the time of the World War. Lack of space forbids more than a somewhat inadequate outline. Readers desirous of fuller information may find it for the most part in Leon Whipple's admirable *Story of Civil Liberty in the United States* (1927), and in the further sources listed there.

The first to suffer from the effects of the Civil War were, of course, those for whom it was supposed to have been fought, the Negroes. The report of General Philip Sheridan to President Grant in 1875 asserted, on the basis of official records, that between 1866 and 1875 nearly 3,600 persons, the great majority of them colored, had been killed or wounded in the single state of Louisiana. With the passing of the Reconstruction period the num-

bers greatly declined, but until 1900 a yearly average of over 100 lynchings occurred and between 1900 and 1917 a yearly average of 70. Well may Mr. Whipple declare, "Lynching has become a national institution." The popular excuse, appealing to a sentimental strain of chivalry in the American nation, that lynching is necessary to preserve the safety of Southern women, is conclusively disproved by statistics which show alleged rape or attempt at rape as a cause in less than one-fourth of the instances. The number of entirely innocent victims cannot be determined, but, owing to the casual methods of mob justice, it must be placed fairly high. And lynching, in itself, implies extreme brutality. One of the illustrative instances given by Mr. Whipple will perhaps suffice:

> Mrs. Turner [a Negro] made the remark that the killing of her husband . . . was unjust, and that if she knew the names of the persons in the mob . . . she would have warrants sworn out against them and have them punished in the courts. . . . [She] was in her eighth month of pregnancy. . . . Her ankles were tied together and she was hung to the tree, head downwards. Gasoline and oil from the automobiles were thrown over her clothing and while she writhed in agony . . . a match applied and her clothes burned from her person. . . . While she was yet alive, a knife, evidently such a one as is used in splitting hogs, was taken and the woman's abdomen was cut open, the unborn babe falling from her womb to the ground. The infant, prematurely born, gave two feeble cries and then its head was

crushed by a member of the mob with its heel. Hundreds of bullets were then fired into the body of the woman, now mercifully dead, and the work was over.

Out of the total of 3,224 lynchings in 1889-1918, inclusive, 702 cases were of whites, showing that the pleasures of lynching ultimately cannot be restricted by the color line. Of recent years, in fact, the Negroes have had more to fear from general race riots than from individual lynchings. Thus, for example, on July 2, 1917, shortly after the United States went to war to preserve democracy, a mob in East St. Louis, Ill., gave an impressive illustration of American democracy by driving 6,000 Negroes out of their homes and murdering between one and two hundred of them.

If the facts of American injustice to the Negro are sufficiently notorious, few are aware that the Chinese immigrants, in proportion to their fewer numbers, have suffered almost equal persecution. When they first came to California, they, like others, sought the mines, but, unlike others, they were driven away by organized violence. The "heathen Chinee" should have no share in Christian gold. Seeking refuge in the cities, he soon found that even American silver was too good for him. In the Los Angeles riots of 1871 fifteen Chinamen were hanged by the mob; in 1876 the list of outrages ran to over 200; in 1886 at Bloomfield, Redding, Boulder, Eureka, and other California towns, riots occurred in which over 1,000 Chinese were driven from their homes. The Chinese Exclusion Act of 1888 was apparently less

needful to preserve the Pacific coast from the yellow peril than to preserve the Chinese immigrant from a white peril which the police were unable or unwilling to prevent. We said, in effect, "Who enters here leaves all hope behind; therefore, do not enter."

The Exclusion Act not only marked the inauguration of a new national policy toward foreigners but, in the methods chosen for its enforcement, it resulted in investing a governmental bureau with autocratic powers. Whatever may be said for the policy of exclusion, and many things, of course, have been said for it, few unprejudiced citizens would insist that the exclusion should be enforced in a needlessly inhuman and tyrannical manner. Yet such is the manner deliberately adopted and defended from the first by the United States Bureau of Immigration. Whereas, of all people, the alien, usually laboring under linguistic handicaps, in simple justice needs full opportunity to prove his case, if he has one, this rendering of elementary justice has been consistently and successfully denied by the Bureau of Immigration. The practice was at once adopted of not allowing the accused alien the benefit of legal counsel until after a preliminary examination by the inspector. After the inspector has presumably made up his mind, counsel may then be brought in in an effort to induce him to change it. But the alien is not allowed the benefit of a jury trial; the proceedings are in secret, press and public both excluded; the immigration official combines the offices of judge and prosecuting attorney. Theoretical relief may indeed be obtained through an act of *habeas corpus* in the local courts, but the courts have adopted the uniform

policy of not interfering with the Bureau unless some technical error can be shown. And the later legislation of 1918, vesting the final authority of deportation with the Secretary of Labor, still leaves all the gathering of evidence and preliminary decisions to the Bureau. The seventeenth-century star-chamber methods of the latter were sanctioned as early as 1892 by the Supreme Court of the United States (*Fong Yue Ting vs. United States*) on the ground that deportation involves no punishment, but is merely a kindly method of removing the alien to his own country because he has failed to comply with the conditions of residence in the United States. In contrast, the opinion of James Madison may be quoted, expressed as it was on the occasion of the similar but short-lived Alien Act of 1798:

> If a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.

Justice Field, dissenting in 1892, agreed with Madison:

> As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted. The laborer may be seized at a distance from his home, his family, and his business and taken before the judge (now the immigration inspector) for his condemnation, without permission to visit his home, see his family, or complete any unfinished business.

The Bureau of Immigration believed to be equal to the task of deciding the legal status of all aliens was soon to be intrusted with the more difficult duty of ascertaining their exact political sentiments. This occurred because of certain events in 1886 and 1901.

On May 4, 1886, at a public meeting in Chicago called to protest against the killing of several people in a clash between police and strikers the day before, a bomb was thrown by some unknown person, which caused many wounds and several deaths. Subsequently eight so-called "Anarchists," members of the International Workingmen's Association, were tried for "constructive" murder on the basis of incendiary language used at various times. Some of them had not even been present at the meeting, and little effort was made to implicate any directly in the crime. As the trial judge said, but said approvingly, "The conviction has not gone on the ground that they did have actually any personal participation in the particular act, . . . but proceeds upon the ground that they had generally by speech and print advised large classes of people . . . to commit murder." Since the evidence failed to show, however, that one of them, Oscar Neebe, had even made any incendiary remarks, he was only sentenced to fifteen years in prison; the rest were sentenced to be hanged. One committed suicide; the sentence of two others was commuted to life imprisonment; the remaining four were executed on Nov. 11, 1886. Six years later, Governor John P. Altgeld pardoned the three survivors, giving at the same time an exhaustive review of the case, in which he said in part:

> It is clearly shown that Ryse was appointed special bailiff at the suggestion of the State's attorney, and that he did summon a prejudiced jury which he believed would hang the defendants; and further that the fact that Ryse was summoning only that kind of man was brought to the attention of the court before the panel was full, and it was asked to stop it, but refused to pay any attention. . . . It is shown here that the bomb was, in all probability, thrown by some one seeking personal revenge.

The last words of the most prominent of the "Chicago Anarchists," August Spies, were memorable:

> There will come a time when our silence will be more powerful than the voices you strangle today.

That time, however, has been long in coming. Where there was one with the patience to follow the record of the trial or Governor Altgeld's later digest of the evidence, there were thousands who believed, and still believe, that a group of bomb-throwing Anarchists had been brought to justice. The American terror of the Anarchist had begun. Thus when in 1901 President McKinley was assassinated by a half-witted foreigner with an unpronounceable name, the act was at once ascribed to Anarchism, although Czolgosz knew no more of Anarchism than of Sanskrit. Almost immediately the State of New York passed its Criminal Anarchy Law of 1902, now famous as the progenitor of similar laws in the majority of states.

> Section 468. a. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence or the assassination of the executive head or any of the executive officers of the government, or by any unlawful means.
>
> b. . . . whoever by word of mouth or writing advocates, advises, or teaches the duty of criminal anarchy . . . is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than $5,000 or both.

Theodore Schroeder in 1906 well brought out the extreme implications of this law in his article, "Our Vanishing Liberty of the Press," mentioned earlier:

> In the state of New York, although satisfied with American conditions and officials, and although you believe in democratic government, if you should orally, or in print, advocate the cause of forcible revolution against Russia . . . you would be liable . . . to a fine of $5,000 and ten years' imprisonment besides.

Nevertheless, the New York legislators of 1902 at least recognized that there is a difference between violent and philosophical anarchy. The distinction was too subtle for the United States Congress, which in 1903 passed the law (later upheld by the Supreme Court) which still governs our national policy:

> . . . That no person who disbelieves in or who is opposed to all organized governments, or who is a member of or affiliated with any organization en-

> tertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity or propriety of the unlawful assault or killing of any officer or officers, either of specific individuals or of officers generally, of the government of the United States or of any other organized government . . . shall be permitted to enter the United States.

The enforcement of this law fell to the lot of the Bureau of Immigration, which henceforth would sit in judgment upon the political philosophy of such men as Prince Kropotkin, Count Tolstoi, Max Stirner, Friedrich Nietzsche, or Ralph Waldo Emerson, if any such should be so unwise as to seek entrance into the United States. Or suppose that Thomas Jefferson should arise from his grave and wish to see again his native land: the Bureau of Immigration would debar that criminal anarchist after sternly quoting to him his own words:

> I hold a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical. . . . What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.

Or what if John Adams should appear, who said:

> The right of a nation to kill a tyrant in cases of necessity can no more be doubted than to hang a robber, or kill a flea.

Away with the constructive tyrannicide!

VII. Contemptible and Contemptuous Courts

If the courts have made no effort to exercise jurisdiction in defense of the legal rights of aliens, they have been eager enough to extend their jurisdiction in other fields. As early as the 'eighties the possibilities of the injunction began to be explored, and it was soon discovered to be a useful but very dangerous weapon. A court of equity by enjoining the performance of acts certain to lead to crime may thus prevent the commission of the crime; this seems a more beneficial and economical method than to wait until the crime has been committed and then punish it. Unfortunately, the injunction, by its very nature, lends itself readily to abuse. It sends men to jail for contempt of court, without the right of trial by jury, despite the clause in the Constitution guaranteeing such right, which is held not to apply. Used most frequently to enjoin normally legal acts which in special instances may be dangerous to property, it has been, notoriously, employed in the most arbitrary manner to break up strikes by preventing peaceful picketing and other legitimate methods of labor propaganda. Its evils were fully revealed in the famous "Gatling Gun" injunction of Judge William A. Woods and Judge P. S. Grosscup against Eugene Debs and others in the Chicago railway strike of 1894. This injunction of the Chicago judges was ostensibly based on the federal enactment against conspiracy in restraint of trade, which had about as much to do with the case as the laws of Hammurabi. The decree read, in part:

> You are hereby restrained, commanded, and enjoined absolutely to desist and refrain from in any way or manner interfering with, hindering, obstructing, or stopping any of the business or any of the following named railroads: [twenty-two named] . . . and from compelling or inducing, or attempting to compel or induce, by threats, intimidation, persuasion, force or violence any of the employees of the said railroads to refuse to perform any of their duties . . . or inducing . . . any . . . to leave the service of such railroads, and from preventing any person whatever, by threats, intimidation, etc. . . . from entering the service, etc. . . .

Debs throughout the strike had urged lawful measures; no hint of violence could be brought against him; nevertheless, he and three others were arrested, first on the conspiracy charge which was so untenable that it was quickly allowed to lapse, and then for sending telegrams in defiance of an injunction so broad that no strike could possibly have been carried on without violating it. They were sentenced to three and six months imprisonment for contempt of court, and the United States Supreme Court upheld the sentences. No legal rights, it seemed, had been violated, except the property rights of the railroads.

The convenient phrase, "contempt of court," thus used to prevent labor leaders from conducting strikes was soon broadened to prevent non-labor leaders—newspaper editors and others—from even criticizing judicial

actions. "Constructive contempt" was added to the list of other "constructive"—*i.e.*, imaginary—offenses. The history of this interesting evolution, mainly occurring between 1903 and 1918, is carefully traced in *Contempt by Publication in the United States* (1928) by Walter Nelles and Carol Weiss King. The federal statute of 1831, still supposed to be in effect, clearly limits the power of the courts to punish for contempt to instances of actual disobedience to the court's orders and "the misbehavior of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice." Gradually in state after state, beginning with Arkansas, this statute has been nullified by judicial practice, reviving the eighteenth-century British doctrine of the "inherent" power of the court to punish any publications tending to bring its administration into disrepute, until today "of the forty-eight states of the Union, there are only six in which we find neither positive adjudication of summary punishability for publications nor indication of judicial tendency in that direction." The "so near" clause of the federal law has been interpreted poetically by the courts to mean spiritual, not physical, nearness. Our judges seem to be of the opinion of that Louisiana magistrate who, when objection was made to his threatening with punishment a bystander on the street for remarks during an execution sale, replied, "I will have you to know that I am an object of contempt at all times and in all places." In a recent case in Cleveland, Ohio, a certain Judge Walther gave as justification of his action in sentencing for contempt two editors of

the *Cleveland Press* the fact that their editorials had so interfered with his sleep that he was unfit to perform his duties! Practically any remark that disturbs the judicial peace of mind has become ground for contempt action, and the judicial peace of mind is disturbed singularly easily. These court suppressions of freedom of the press were definitely sanctioned by the United States Supreme Court in 1918 (*United States* vs. *Toledo Newspaper Co.*) in the case of the *Toledo News-Bee*, which had intimated that a certain Judge Peck of that city was biased in favor of the traction interests. Justice Oliver Wendell Holmes, dissenting from the majority decision, caustically pointed out its departure from what had usually been considered normal common sense:

> A judge of the United States is expected to be a man of ordinary firmness of character. . . . I confess I cannot find . . . in the evidence in the case anything that would have affected a mind of reasonable fortitude.

VIII. The Rise of the Snooper

It was not to be expected that the powers of industry would remain content, in their frequent labor difficulties, with the somewhat uncertain assistance of court injunctions. In fact, before the delightful possibilities of the injunction were at all generally appreciated, industry had already gone about the problem in its own way by creating private detectives and private police. The private detective, like lynching, has become an American insti-

tution, and an equally discreditable one. The sinister powers and methods of the great detective agencies are quite unrealized by the ordinary citizen, who seems to imagine that private detectives exist mainly to track down the sins of erring spouses or to assist an inadequate police in protecting lonely dwellings against burglary. Such services, however, are merely incidental, from the point of view of the agencies; their chief purpose has always been to furnish strike-breakers, gunmen, and labor spies to industrial organizations. Sidney Howard in *The Labor Spy* (1924), a careful study of their activities, accepted the estimate that three syndicates alone employed 135,000 men, 75 per cent of whom were working secretly in labor unions. According to Mr. Howard:

> You will not find a strike of any consequence from Homestead to Herrin in which the labor-detective agencies and their spies have not played an important and, too frequently, violent rôle. You will not find any line of manufacturing with which they are not vitally connected. When the famous Commission on Industrial Relations conducted its hearings in 1915, scarcely a single worker or employer appeared before it who had not some story to tell of this ugly calling.

The head of a firm in Cleveland who said, "I own every labor union in this town," once furnished 10,000 strike-breakers to a single company, and another firm in New York City said to the Industrial Relations

Committee that they could do the same in seventy-two hours. The presence in labor disputes of these irresponsible capitalist armies has from the beginning led to violence and crime, the earliest instance of which was "the battle of Homestead" in Pennsylvania, July 6, 1892, when a gang of 300 armed Pinkerton men, sent up the river by night on barges from Pittsburgh, was prevented from landing by a crowd of strikers, and, after a twenty-four hours' gun-fight, was forced to surrender. The old story—violence creating violence. A congressional investigating committee mildly reported that the system of employing private constabularies "might well excite feelings of apprehension and danger." The report of the West Virginia Mining Commission investigation of 1912 said in regard to the strike-breakers furnished by a certain agency, that they had "openly, recklessly, and flagrantly violated, in respect to the miners . . . the rights guaranteed by natural justice and the Constitution." The report on the Michigan Copper Strike of 1913 charged certain detectives and deputies with several deliberate murders. The more recent brutalities of the Pennsylvania Coal and Iron Police have been such as to call for special consideration in a later chapter. The final verdict of reason on the whole system is surely that of Thomas Belt of Scotland Yard:

> The private constabulary system, by which armed forces are employed during labor troubles, has worked untold damage in America. . . . In no other country in the world, with the exception of China, is it possible for the individual to surround himself

with a standing army to do his bidding in defiance of law and order.

Large strikes, however, are not of daily occurrence, and would not of themselves enable one firm, for example, to pay in a single year an income tax of $258,000. The main function of the detective agencies is to furnish, all the time, labor spies, politely called "undercover men," who join the unions in order to influence their actions and to report to their employers all that occurs. It is only too evident that their influence is frequently, if not usually, exerted to cause acts of violence that will bring discredit on the unions. This, Mr. Belt suggests, is the chief reason for the maintenance of the system. Anyone who follows strike records will notice how rarely the lawlessness connected with them damages vital interests of the owner, how habitually it results in injuring the cause of the workers. The frame-up has been developed by the ingenuity of the detective syndicates into a leading form of American art. National tolerance of the employment of these large bodies of mercenaries, at worst bravos and at best stool-pigeons, is a curious feature of a supposedly civilized community. The temper of mind involved has, naturally, spread beyond its point of origin. From the complacent acceptance of the labor spy there is no great step to the acceptance of every other kind of spy. It is not surprising that the spirit of snoopery, admitted as a part of good business in the period under discussion, should threaten to become a national characteristic in the present period.

IX. "To Hell with the Constitution"

When federal bureaus, the courts, and private corporations were all hurrying to enlarge their powers at the expense of the citizenry, state governments joined in the race. In 1892 the important discovery of the hitherto unrecognized potentialities of "state martial law" was made. Up to this time the customary interpretation of martial law had been that it was not to be invoked except in cases of actual insurrection and that it did not abrogate the civil rights of the community as long as the courts remained in session. But in the Cœur d'Alene strike in Idaho in 1892 the governor, having first issued a proclamation forbidding the strikers to attempt persuasion with the strike-breakers, on the first instance of the violence which he had thus indirectly encouraged called out the state troops, not to aid, but to supersede the local authorities. Sheriffs and marshals were arbitrarily removed from office by the military, and more than 500 men were immediately arrested without warrant and thrown into bull-pens. Not one of these men was ultimately shown to have committed the slightest crime. Nevertheless, the new method of preserving law and order was considered so successful that it was again invoked in Idaho seven years later, when, this time, 800 miners were seized by the military and confined for months in old box cars and a deserted barn under inhuman conditions which resulted in prolonged illnesses and several deaths; out of the 800, thirteen were finally con-

victed for obstructing the United States mails—"constructive" obstruction, presumably, since the mail trains had arrived on time—and one was sentenced for second-degree murder. Thus a much higher percentage of justice was secured than in the preceding instance, the difference between 14/800, or even 1/800, and 0 being nothing less than infinite. Encouraged by this spectacle of infinite justice in Idaho, other states followed her example. Since 1894 martial law has been proclaimed ten times in Colorado; that is, on an average of once in every three and a half years, the citizens of certain sections of that state pass from life under civil law to life under military law. And military law with its privilege of arbitrary commands, arrests, and deportations, looks, to the civilian, remarkably like lawlessness. When it was pointed out to a certain lieutenant in Cripple Creek that his acts were in violation of the Constitution, he replied: "To hell with the Constitution. We aren't going by the Constitution." One is inclined at first blush to admire the hardy lieutenant's honesty, but it is probable that he did himself an injustice. For the military arrest and detention for three months of Charles Moyer in 1904, on general principles and because he was an officer of the Western Federation of Miners, came eventually before the Supreme Court, which upheld the military, declaring that no rights under the federal Constitution had been infringed.

If any doubts remained of the impotency of the Constitution to protect against such acts, they were set at rest by the case of the kidnapping of John Moyer and G. A.

Pettibone of the Western Federation of Miners on a charge of having exploded the bomb which killed a former governor of Idaho on December 30, 1905. Both men were out of the state, Moyer not having been in it for over ten years, and the case against them was far too flimsy to justify public extradition, so they were privately kidnapped. When it was argued in an Idaho court that this act was unconstitutional, the judge replied:

> I am tired of these appeals to the Constitution. The federal Constitution is a defective, out-of-date instrument, anyhow, and it is useless to fetch that document into court. But Constitution or no Constitution, we have got the men we went after; they are here; they are going to stay here until we have had our final say, and I would like to know what is going to be done about it?

But the judge, like the lieutenant, was wrong; it turned out, when the issue reached the Supreme Court, that everything had been perfectly constitutional.

> Even if the arrest and deportation of one alleged to be a fugitive from justice may have been effected by fraud and connivance arranged between the executive authorities of the demanding and surrendering states so as to deprive him of any opportunity to apply before deportation to a court in the surrendering state for his discharge, and, even if, on application to any court, state or federal . . . he would have been discharged, he cannot, so far as the Constitution or the law of the United States are

> concerned, when actually in the demanding state, in the custody of its authorities for trial and subject to the jurisdiction thereof . . . be discharged on habeas corpus by the federal court.

In other words, an unconstitutional act ceases to be unconstitutional if it is successfully achieved.

Justice McKenna, to be sure, dissented:

> In the case at bar, the states, through their officers, are the offenders. They by an illegal exertion of power deprived the accused of a constitutional right. . . . And constitutional rights the accused certainly did have. The foundation of extradition between the states is, that the accused should be a fugitive from justice from the demanding state, and he may challenge the fact by habeas corpus immediately upon arrest. If he refute the facts, he cannot be removed. . . . No individual could have accomplished what the power of the two states accomplished . . . could have made two arrests of prominent citizens by invading their homes; could have commanded the resources of jails, armed guards, and special trains; could have successfully timed all acts to prevent inquiry and judicial interference.

The hand of Destiny was already writing on a not distant future page of history *The United States* vs. *The Spirit of '76*—the title of one of the first cases to be tried in the World War. Ostensibly this involved only the suppression of a moving-picture film named "The Spirit of '76" for presenting Paul Revere's Ride and the Wyoming

Massacre, items deemed likely to offend the tender sensibilities of our newly wed British allies;—but actually, this and all the other similar issues in the World War were but particular counts in the longer case of *The United States* vs. *The Spirit of '76* that had been going on since the days of Tocqueville—a case in which the "Spirit of '76" had lost nearly every decision, and in which it was to lose many more during the next ten years—but a case which is not yet ended, and will not be ended until the last free American is dead.

CHAPTER III

The State Can Do No Wrong . . . in War

A victorious war may bring to a nation a complete regeneration—the moral energies awake; vice is repressed; life is protected; education flourishes; hygiene spreads; science rebuilds the land; prosperity grows; temperance and self-discipline prevail; family life can expand in the new abundance.

—Hugo Münsterberg

There is no good war and no bad peace.

—Benjamin Franklin

If the people cannot discuss the war they have got to fight for and pay for, who under heaven can?

—Theodore Parker

The cry has been that war is declared, and that all opposition should therefore be hushed. If the doctrine be admitted, rulers have only to declare war and they are screened at once from scrutiny. . . . We should teach our present and all future rulers that there is no measure for which they must render so solemn an account to their constituents as for a declaration of war; that no measure will be so freely discussed.

—William Ellery Channing

If this blessed old republic cannot rest upon the free and voluntary support and affection of the American people in time of war as well as in time of peace, if

we cannot, as a people, be free to discuss the political problems which involve limb and life, even in time of war, our government rests upon a very brittle foundation.

—Senator Borah

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CHAPTER III

The State Can Do No Wrong . . . in War

I. Making the World Safe for Democracy

If you ask the average American today why we went into the World War, he is likely to answer, "Because of the sinking of the *Lusitania*." If you point out that the *Lusitania* was a British ship, proved to have been carrying munitions of war, and that it was sunk in the spring of 1915, while the United States did not enter the conflict until two years later, he will probably look a little nonplused and then say, "Well, I think there were some American ships sunk, too, but I suppose the real reason was that we had become convinced the Allies could not win without us." If an idealist, he will add, "Morally, we had been with the Allies all along, and we had to go in to save our own institutions." If you persist, and ask, "What institutions?" he will reply, perhaps rather faintly, "Oh, liberty and democracy and that sort of thing." On the other hand, if your *vis-à-vis* is a disillusioned realist, he will say—as a certain Democratic governor said to the writer in 1918, and as nearly a thousand men who were not governors were sent to prison for saying—"The government had to do it to save the bankers who had bet

on the wrong horse." But if, once more, you persist, and ask for proof, he will probably say, "Oh, it's sufficiently self-evident."

The only thing that is self-evident is that we do not know just why we went into the war. There were many causes, many motives, and it is impossible to determine the proper weight to be given to each.

If one turns back to the newspaper and magazine accounts of the beginning of the war in August and September, 1914, he will be struck by their impartiality of tone. The war was looked upon as a European catastrophe, a tragedy at which the United States occupied the privileged position of a sympathetic spectator. President Wilson's declaration of a universally benevolent neutrality unquestionably expressed the attitude of the American people at the moment. But by the end of the first six months a change was already perceptible. There had developed definitely pro-German and pro-Ally parties threatening to divide the country.

The millions of Americans of German and Austrian descent, although very few of them probably sympathized with Prussian imperialism, nevertheless resented the American assistance given the Entente through the sale of munitions. It was in vain to assert that this was a mere matter of business; that our munition-makers would have been equally glad to sell to Germany or anybody else who could buy; that the British blockade, not the United States government, was responsible. As to extending our neutrality to the point of prohibiting the exportation of munitions altogether, no one familiar with American standards could expect us to countenance such

interference with "our" legitimate business. All this was true, but was an inefficacious balm to those compelled to watch our death factories working full blast to produce the materials of slaughter for friends and relatives. They felt that, whatever might be the technicalities of international law, actually the United States was one of the Allies. This feeling was intensified by our unwillingness to make concessions to the difficulties of the German submarine campaign. When German inventive genius had worked out a new form of blockade uncontemplated in older international law and admittedly incapable of fully meeting its demands, it seemed hard that the United States should stand upon the letter of the law and refuse to coöperate with genius even to the extent of plainly marking our ships and giving notice of their sailing dates. Finally, the loans made by American bankers in the fall of 1915 established in the minds of many others than those of German descent the conviction that the United States, whenever needful, would openly proclaim an alliance already sealed by the support of such powerful interests.

On the other hand, the majority of Americans were being swept even more violently along the opposite course. Few were able to discount properly the fact that, direct communication with Germany being cut off, practically all of the reports of the conduct of the war that reached us came through the Allies. Of the tales of German outrage that poured into the country no American was able to judge the degree of truth or falsity; so, belief being a far easier and more instinctive attitude than doubt, most of us ended by believing everything.

Furthermore, such German propaganda as did reach us was singularly tactless and arrogant, almost always implying that we were weak or sentimental or dishonest, or, most probably, all three. The ruthless logic of the German policy of "thorough," which seemed to assert that war, being by nature an appeal to force, necessarily abrogated all peace-time laws, and that modern warfare in particular, being conducted by entire peoples, abrogated the distinction between combatants and noncombatants, irritated us the more because we did not know just how to meet it, and confirmed us in the belief that the Germans were monsters outside the human pale. What had begun as a mere war between nations became in our eyes a cosmic struggle between right and wrong.

For two years we watched the moral law suffer defeat after defeat. The angels were everywhere in flight before the demons. The German dragon cracked the bones of nations in its jaws. It stalked invulnerably across the fields of Europe and cast leering eyes over the ocean. By neglecting our duty so long had we not perhaps enabled the enemy to become invincible? A new phrase began to be heard: "If Germany wins, America will be next." Visions of a Prussianized United States haunted the imagination—a United States ruled by an imperialistic government—a United States where freedom of speech would be stifled in political prisons, where personal liberty would become familiar with the sign "*Verboten*," where the policeman would be more than the citizen and the old careless words, "This is a free country," would never more be heard.

And so, ostensibly at least, the nation went to war to preserve what it had already lost. It went in clad in the shadow of liberty. It was to come out stripped even of the shadow.

II. Conscription

> One heard much about the democratic method of conscription, coupled with dire threats of punishment for draft evaders.—Norman Thomas, *The Conscientious Objector* (1923).

War was declared on April 6, 1917. The traditional policy of noninterference in European affairs, so earnestly advised by George Washington, had been at last abandoned. Six weeks later, on May 18th, another even more important tradition was thrown into the discard with the adoption of conscription. This was accomplished by the enactment which, with our modern taste for giving pleasant names to unpleasant realities, was called the Selective Service Act. The analogy claimed between this and the Civil War drafts in both North and South was really no analogy at all, because the occasions differed utterly. Here was no rebellion or invasion; men were not called to defend their own or their neighbors' homes; on the contrary they were sent three thousand miles away across the sea. The overwhelming fact that made conscription inevitable was simply the belief, probably correct, that the war could not be waged efficiently without it. It is difficult today to deny the truth of Norman Thomas's words in *The Conscientious Objector* (1923),

reprinted in slightly enlarged form as *Is Conscience a Crime?* (1927)

> The very men who boasted loudly that the recent war was the people's war revealed their fear by insisting that the people must be conscripted to fight it. From the most remote hamlets of Europe, Asia, and North America the hand of the state dragged men to die in a war which they did not understand. Slayers and slain alike only knew that they who bade them fight told them they fought for freedom and the defense of the fatherland. Not otherwise could the Great War have been waged. The sovereignty of the state and the right of conscription, defended in the name of the common good over the conscience of the individual, were indisputably among the causes of the greatest calamity of modern times.

Who can doubt that major wars would disappear if in every great nation the right of conscription were denied to the government? If those who wanted war were forced to do the fighting themselves, how many wars would there be? The spectacle of a few doddering diplomats and pot-bellied capitalists struggling on the field of battle would present no great terror to the world. Or if real wars continued, conducted as of old by paid troops, they would be deprived of the present horror due to vast multitudes engaged. They would no longer threaten the very existence of civilization, and would sink back among the minor unamiable amusements of mankind. If we were really serious in our alleged love of peace, this is the direction that our efforts would take, more effective,

if successful, than a thousand peace conferences on reduction of armaments or a thousand scraps of paper "renouncing war." Yet there is not a nation in the world serious enough or democratic enough to adopt such a policy, least of all the United States. And we are now much farther from ever being able to take the lead in any such policy than we were in 1917, thanks to our "democratic" Selective Service Act.

Congress, perhaps recalling some passages of the New Testament, at any rate aware of the existence of pacifist bodies such as the Quakers, did indeed incorporate a religious exemption clause in the conscription act:

> Sec. 4. . . . nothing in this act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form, . . . but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant.

It will be observed that this tolerance was extended only to groups, not to individuals unenrolled in any religious sect. The members of Congress were able to conceive of a corporate conscience, but that there was such a thing as an individual conscience was beyond them. This was not because the matter had never been called to their attention. Norman Thomas, Jane Addams, and Lillian Wald forcibly presented the case to a sub-

committee of the Military Affairs Committee of the Senate, which listened courteously and took no action; Senator La Follette's amendment offering a broader basis for exemption was immediately voted down; so also was Representative Keating's similar amendment in the House. "By actual count, the House spent as many minutes in discussion of the *wording* of exemption of ministers of the gospel as on the whole subject of conscientious objection" (Norman Thomas). Had they spent a little longer, the members might have noticed that there were certain omissions in the enactment that were sure to lead to just the kind of hideous absurdities that in fact resulted. Owing to the intelligence and liberalism of the Secretary of War, Newton D. Baker, the regular exemption privileges were later extended to many individual political objectors, but Secretary Baker himself was unable to mitigate the other and more serious injustices resulting from the congressional impatience.

A first differentiation among the objectors which was unprovided for by the new law but was of grave significance in practice may be illustrated by the case in England of Lytton Strachey, later to be known as the greatest of modern biographers. When officially asked if he had "conscientious objections to war," he replied, "Oh no! Not at all; only to *this* war." No moral right to object only to "*this* war" was recognized in America. Objectors of the type of Lytton Strachey, being always suspected of pro-Germanism, were treated much more brutally in the concentration camps than were the general pacifists. A pamphlet circulated by the National Security League and written by George Herbert Meade, a professor in

the University of Chicago, gave the orthodox attitude on the moral issues in conscientious objection:

> Whenever and wherever an act runs so counter to a man's moral nature that he cannot carry it out and still keep house with himself, his refusal in the face of any and all authority commands our instant respect. If such men could be certified to the exemption board beyond a doubt, any thinking, self-respecting community would demand their exemption. . . . [But] the man who admits that under some conditions fighting is moral, and that conditions may arise under which the community may call upon him to fight, cannot claim that his objection to the issues of the actual war can be made an excuse for his not registering and responding to the draft.

Denuded of academic language this seems to mean that if a man conscientiously opposes all wars he should obey his conscience, but if he conscientiously opposes some particular war, he should disobey his conscience. To simple minds, the reasoning of Carl Haessler, Rhodes scholar and professor of philosophy imprisoned at Alcatraz, is easier to follow:

> The wilful disobedience of my captain's and of my lieutenant-colonel's orders arose from a conviction which I hesitate to express before my country's military officers but which I nevertheless am at present unable to shake off, namely, that America's participation in the World War was unnecessary, of doubtful benefit (if any) to the country and to humanity,

> and accomplished largely, though not exclusively, through the pressure of the Allied and American commercial imperialists. Holding this conviction, I conceived my part as a citizen to be opposition to the war before it was declared, active efforts for a peace without victory after the declaration, and a determination so far as possible to do nothing in aid of the war while its character seemed to remain what it was.

A second and, in practice, still more important differentiation among objectors which was unrecognized by Congress was that between the moderate objectors willing to accept noncombatant service and the severely logical "absolutists" who refused to take any part in the war either directly or indirectly. The latter amounted to only 450 out of a total of 3,989 objectors, but they were intellectually the pick of a superior body of men. Army intelligence tests in camps, reported by Lieutenant Mark May in the *American Journal of Psychology*, April, 1920, indicated that the moderate objectors excelled the enlisted men by a ratio of two to one in the A and B intelligence groups, while similar tests at Fort Leavenworth, reported by Winthrop D. Lane in the *New Republic*, April 14, 1920, resulted in ranking the absolutists above even the commissioned officers. Superiority in force, however, if not intelligence, rested with the officers. Deprived of any recognition of their existence by the civil law, the absolutists were turned over to the military in the guise of "insincere" objectors. Thus Major-General Leonard Wood, in command at Camp Funston and Fort

Riley, where savage treatment of objectors was permitted —terrible beatings, torture by the "water cure," immersion in latrines, incipient hangings—was enabled to distinguish between the "real conscientious objector" doing noncombatant work and the "vicious group" of "frauds," "all of the alien type," who refused every kind of service. I do not know whether logic is taught at West Point; presumably not; at any rate, while no one would claim that logic is a peculiarly American quality, it was left for General Wood to point out its essentially "alien" character. The "insincere objectors" were tried by court-martial, and the list of sentences was later given out by Assistant-Secretary Keppel, including, in a total of 450 cases, 89 sentences of ten years' imprisonment, 47 of fifteen years, 73 of twenty years, 57 of twenty-five years, 19 of thirty years, and 142 of imprisonment for life! O George the Third, come back and be our king!

In contemporary England—not the England, or the modern America, of George the Third—the longest sentences imposed upon conscientious objectors were for two years, renewable for two years more. The cause of the objectors was argued by such men as Gilbert Murray, John Galsworthy, Hilaire Belloc, and Arnold Bennett. A petition in their behalf was signed by twenty bishops of the established church. But in America only a few, lesser-known writers in the *Liberator*, *Nation, Survey,* and *New Republic* uttered their uninfluential protests. The rest was silence.

After the Armistice, the court-martial sentences were gradually reduced by the War Department, and, one by one, slowly and at long intervals, all the objectors were

finally released, although some were still in prison as late as 1923. Grudgingly and without acknowledgment of error, the government undid its wrongs. No Samuel Sewall arose after this modern witchcraft craze to make public confession of misdeeds. And when the next war comes?

III. Espionage

In 1917 the right of free speech in time of war had been traditional in America for over a century. Criticism of governmental policy during the War of 1812 occurred widely. Denunciations of the Mexican War were delivered on the floor of the Capitol; Thomas Corwin, Senator from Ohio, attacked the purpose and the conduct of the war and declared the statements of President Polk and his Cabinet to be a "feculent mass of misrepresentation"; Daniel Webster asserted, "We are, in my opinion, in a most unnecessary and therefore a most unjustifiable war"; Charles Sumner declaimed, "Base in object, atrocious in beginning, immoral in all its influences, vainly prodigal of treasure and life: it is a war of infamy which must blot the pages of our history"; Henry Clay pleaded, "Must we blindly continue the conflict, without any visible object, or any prospect of a definite termination?" Outside of Congress, James Russell Lowell in *The Bigelow Papers* brought all the resources of the wittiest mind in America to satirize the government and the enlistment of soldiers. Even in the crisis of the Civil War, when national existence seemed at stake, although there were

many violations of civil rights, the general principle of free speech was still so far upheld that the Democratic Party in 1864 could safely adopt a platform declaring the war a failure and denouncing its continuance. But in 1917 this tradition was no longer in harmony with the temper of the nation and in a little over two months it perished ignominiously.

First came the fiery bill introduced by Senator Chamberlain of Oregon making the entire United States "a part of the zone of operations conducted by the enemy," and defining as a spy subject to death by court-martial every person who should publish anything endangering the success of the military forces—a bill from which the country was saved by the opposition of President Wilson. Then came the Espionage Act, adopted on June 15, 1917, which, after the utter madness of the Chamberlain bill, seemed like the height of sanity.

> (1) Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the cause of its enemies, and (2) whoever . . . shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or (3) shall wilfully obstruct the recruiting or enlistment services of the United States, . . . shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

The operation of the law soon went far beyond the original intent of Congress. Embarrassed with its new duties, the Department of Justice accepted the assistance of private organizations, particularly of the American Protective League, with its membership of 250,000, which became a kind of unofficial auxiliary of the government. The letterhead of the League bore the truthful statement, "Organized with the approval and operating under the direction of the United States Department of Justice, Bureau of Investigation." Henry G. Clabaugh, Chicago agent of the Department of Justice, declared, "Without exaggeration, I think the Chicago division of the A. P. L. did 75 per cent of the governmental investigation work of the Chicago district throughout the war." The methods of the League are proudly described by Emerson Hough in *The Web* (1919) "a revelation of patriotism; published by authority of the national directors of the American Protective League":

> . . . the League examined all the personal and business correspondence of thousands of men who never were the wiser. . . . The operator takes from his pocket a little boxlike instrument which he sets upon the table. He has a perfectly effective electric camera. . . . Everything is replaced exactly as it was found. . . . The League broke some little laws and precedent? Perhaps. But it upheld the great law under the great need of an unprecedented hour.

What Zechariah Chafee well calls "the passion for becoming spies" led to the formation of many other societies less reputable than the American Protective League.

In an excellent article on "The Vanishing Bill of Rights" in the *Minute Man*, January 22, 1929, Forrest Revere Black, of the University of Kentucky, lists some of the enthralling names chosen by these groups: The Terrible Threateners, The Sedition Slammers, The American Anti-Anarchy Association, The Anti Yellow Dog League, The All-Allied Anti German League, The Liberty League (!), The Knights of Liberty (!!), The American Rights League (!!!). These extraordinary manifestations were the direct effect of wild rumors that seemed to circulate as easily in twentieth-century educated America as their forerunners had done in medieval illiterate Europe. No tale was too improbable to be believed. German submarine captains had landed and were spreading influenza germs in the theaters. German aëroplanes were seen floating over Kansas. A report that German battleships were in the Pacific Ocean led numerous citizens to prepare to fly to the mountains. Alas for the proud words of President Wilson's neutrality message of 1914, in which he had so confidently appealed to America to "show herself at this time of peculiar trial a nation fit beyond others to exhibit a fine poise of undisturbed judgment, the dignity of self-control, the efficiency of dispassionate action; a nation that neither sits in judgment upon others nor is disturbed in her own counsels." This nation had existed only in the President's sanguine imagination. Fifty years of growing familiarity with fear habits and the oppression of personal liberty had produced an unstable national temperament subject to hysterical terrors and outbursts of hysterical rage.

Hearken to the words of Judge Amidon:

> For the first six months after June 15, 1917, I tried war cases before jurymen who were candid, sober, intelligent business men whom I had known for thirty years, and who under ordinary circumstances would have had the highest respect for my declarations of law, but during that period they looked back into my eyes with the savagery of wild animals, saying by their manner, "Away with this twiddling, let us get at him."

Too frequently the judges were as eager as the juries to "get at him." Judge Van Valkenburgh's remarkable definition of free speech—"criticism which is made friendly to the government, friendly to the war, friendly to the policies of the government," was only the frank expression of a belief held by many of the courts.

Some such definition must have been in the mind of even Attorney-General Gregory, for when twenty-seven South Dakota farmers were given a year in prison for petitioning for a popular referendum on the war, he referred to the decision as "one of the greatest deterrents against the spread of hostile propaganda, and particularly that class of propaganda which advanced and played upon the theme that this was a capitalists' war." During the first year, there were about five hundred such "deterrents." Of these, the most important cases, which came before the Supreme Court, will be considered in a later chapter. Here perhaps it will suffice to give a few fair samples taken from *Freedom of Speech* (1920) by Zechariah Chafee, Professor of Law in Harvard University.

A man named Clark sentenced for having threatened

to kill the President because he had said, "I wish Wilson were in hell, and if I had the power I would put him there," the court holding that Wilson could not be in hell unless he were dead.

J. P. Doe, son of the Chief Justice of New Hampshire, sentenced to eighteen months' imprisonment in Colorado for starting a chain letter arguing that Germany had not broken her pledge to end submarine warfare.

Rose Pastor Stokes sentenced to ten years' imprisonment for saying, "I am for the people and the government is for the profiteers."

Rev. Clarence H. Waldron, of Windsor, Vt., sentenced to fifteen years' imprisonment for a pacifist pamphlet maintaining that war is inconsistent with Christianity.

D. T. Blodgett sentenced to twenty years' imprisonment for a pamphlet urging the voters of Iowa not to reëlect congressmen who voted for conscription.

D. H. Wallace, an ex-British soldier, sentenced to twenty years' imprisonment for saying that when a soldier goes to war he is a hero and when he returns he is a bum.

Apology is due to George the Third for suggesting in the previous chapter that war-time America would have been a congenial residence. Although not precisely an over-liberal monarch, he would have been shocked at the conditions here. During his reign, the longest sedition sentences were for four years; during the World War there were, in America, eleven sentences of ten years, six of fifteen years, and twenty-four of twenty years. Meanwhile, in tyrannical Germany, Karl Liebknecht was sentenced for only four years, after having for two years unsparingly denounced the war, both in the

Reichstag and at public meetings. The making of the world safe for democracy was having some curious results.

The rapidity of the American descent to Avernus may be seen by comparing the language of the first Espionage Act of 1917 with that of the amended Act passed on May 16, 1918. Attorney-General Gregory, unsatisfied with his 500 convictions, had demanded more stringent legislation, and he obtained it. When a proposal was made to exempt anti-war views expressed with good motive and for justifiable ends, the Attorney-General insisted that this would "destroy the value of the Espionage Act as a weapon against propaganda," since evil motive was often not present and often, when present, could not be proved. Congress took as a model for its amended Act the drastic Montana sedition law of 1918, which, by an interesting irony, was to be declared unconstitutional by the state supreme court in 1921.

The marvellous Espionage Act as finally amended read in part as follows:

> Whoever, when the United States is at war, shall wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, . . . and whoever shall wilfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and who-

ever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

To find any parallel for this legislation one must go back to the Sedition Act of July 14, 1798, passed during our naval war with France. The parallel there, however, is so close that it is worth while to quote the relevant portions of the earlier Act:

If any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them or either of them, into contempt or disrepute; . . . or to stir up sedition within the United States . . . or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years. . . . And be it further enacted, and declared, That if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for

> the defendant, upon trial of the cause, to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel. . . . And be it further enacted, That this act shall continue and be in force until the third day of March, one thousand eight hundred and one, and no longer.

The general purposes of the two Acts were, of course, identical. Each was a war measure designed to aid in the winning of a war in which the country was actually engaged; each sought to render this aid by the suppression of hostile criticism. Every excuse advanced in defense of the Espionage Act could have been adduced, with greater force, in justification of the Sedition Act. The foreign situations were strictly analogous: in 1798 France was at war with the rest of Europe, even as Germany in 1917; in 1798 France was held to have disregarded our neutral rights and to have scorned our protests, even as Germany in 1917; but whereas neither of the two great political parties in 1917 had ever been pro-German, the Republican party in 1798 had been pro-French for years. The danger of pro-German propaganda in 1917-18 was as nothing in comparison with the danger of pro-French propaganda in 1798. Furthermore, in 1798 the United States was still small and weak; in 1917-18 it was large and powerful.

A comparative analysis of the two Acts reveals, along with the similarity of general intent, certain striking differences of detail not favorable to the later measure. The Sedition Act was self-limited in duration; the Espionage Act, if unrepealed, would be in force at any

time "when the United States is at war." The penalties in the Espionage Act were ten times as great as in the Sedition Act; where a malicious liar could only be sent to prison for two years, now anybody might for a bit of mockery be sent for twenty. The Sedition Act was directed only against "writing or writings" and the verbal quotation of such writings; the Espionage Act was directed more widely against "language" whether uttered or written. In the Sedition Act truth was admitted as a defense; in the Espionage Act there was no such admission. For the relatively clear and definite adjectives of the earlier measure, the later one substituted vague and emotional words incapable of exact definition. The objects about which one must not utter "disloyal, profane, scurrilous, or abusive" remarks are so much more numerous than those which one could not earlier treat in "false, scandalous and malicious writing" that it is rather surprising that the Espionage Congress did not include, along with the flag and the uniform, the national anthem—perhaps the congressmen were uncertain whether it was "The Star-spangled Banner" or "America"—and the quality of the designs of our national stamps and the beauty of the eagle on the American dollar. Yet the Espionage Congress may have had a sense of humor, after all; the inclusion of "the Constitution of the United States" among its objects of reverence was a quite sublime piece of irony—or was it merely that the congressmen had never read as far as the First Amendment? In only one point was the Espionage Act less illiberal than its predecessor; it did not explicitly prohibit criticism of

Congress or the President; but this distinction was declared by the Supreme Court to be merely "technical."

On one vital matter the parallelism between the earlier and later Acts breaks down completely, namely, in the character of their reception by the nation. Woodrow Wilson in his *History of the American People* (1901) was merely repeating the traditional judgment when he said of the Sedition Act that it "cut perilously near the root of freedom of speech and of the press." The contemporary condemnation had been even more forceful. Jefferson drafted resolutions adopted by the Kentucky legislature declaring that in view of the First Amendment to the Constitution forbidding any abridgment of the freedom of the press

> . . . therefore the act of the Congress of the United States . . . which does abridge the freedom of the press, is not law, but is altogether void and of no effect [and further stating] that these and successive acts of the same character, unless arrested on the threshold, may tend to drive these states into revolution and blood, and will furnish new calumnies against Republican Governments, and new pretexts for those who wish it to be believed, that man cannot be governed but by a rod of iron: that it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights; that confidence is everywhere the parent of despotism: that free government is founded in jealousy and not in confidence.

Only slightly milder was James Madison, "the father

of the American Constitution," who drafted resolutions adopted by the Virginia legislature, in condemnation of this act which

> . . . exercises . . . a power not delegated by the constitution, but on the contrary expressly and positively forbidden by one of the amendments thereto; a power which more than any other ought to produce universal alarm, because it is levelled against that right of freely examining public characters and measures, and of free communication thereon, which has ever been justly deemed the only effectual guardian of every other right.

Protests against the Sedition Act came in from every section of the country, bearing thousands of signatures and increasing from month to month. Another measure, passed at about the same time, the Alien Act, shared the public wrath. As a result of the general execration aroused by these two measures, at the next election the Federalist Party was swept out of office and was not forgiven for twenty-five years. The United States pardoned all prisoners and repaid their fines.

But in 1918 the same law condemned by Woodrow Wilson, professor at Princeton, was, in a more drastic form, signed by Woodrow Wilson, president of the United States. It was so admired by the American people that during the next two years thirty-one states adopted legislation modeled upon it. And when the next war comes, it, or some still harsher analogue, will be used to stifle all criticism in this land of the free from thought, this home of the brave against ideas.

CHAPTER IV

The State Can Do No Wrong...in Peace

Yourselves pretend liberty of conscience, but alas! it is but self, the great god self, only to yourselves.

—Roger Williams

If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.

—Thomas Jefferson

The real value of freedom of speech is not to the minority that wants to talk, but to the majority that does not want to listen.

—Zechariah Chafee

CHAPTER IV

The State Can Do No Wrong...in Peace

I. Lord Chief Justice Scroggs in America

The Armistice was declared on November 11, 1918. Germany had already granted amnesty to all her political prisoners, and Italy followed eight days after the Armistice. France took similar action during the year. But the United States, it will be recalled, long after other nations, still remained technically at war with Germany. This furnished an excuse for a much less generous policy than was adopted elsewhere. In the same niggardly and hesitating manner as with the conscientious objectors, the sentences of the espionage victims were gradually cut down or set aside, and the last political prisoners were not released until the end of 1923. Even then, their civil rights were not restored.

The national rejoicing on Armistice Day, 1918, proved premature. The war with Germany was really over, but the war of America against Americans continued. The fact that the Espionage Act remained technically in force left government bureaus technically in possession of wartime powers which they were little disposed to resign.

This was especially true of Postmaster-General Burleson. In December, 1919, still acting under his war-time powers, he raided and closed the *Seattle Union-Record* because he did not like its remarks about certain members of the American Legion. For over a year after the Armistice he kept the New York *Call* from the mails, announcing to the Supreme Court of the District of Columbia that his action was "not subject to be reviewed, reversed, set aside, or controlled by a court of law." The Postmaster-General's ideas of what constituted seditious utterance may be gathered from even a partial list of the publications to which at one time or another he denied mailing privileges:

the *Public*, for advocating the raising of more money by taxation and less by loans;

the *Nation*, for criticizing Samuel Gompers;

the *Freeman's Journal and Catholic Register*, for reprinting Thomas Jefferson's statement that Ireland ought to be a republic;

the *Irish World*, for declaring that France had long tended toward materialism and that Palestine would become an English protectorate instead of a free Jewish state;

Thorstein Veblen's *Imperial Germany and the Industrial Revolution* (1915), which had been officially *recommended* by the government through the Committee on Public Information!

Surely there was reincarnated in Mr. Burleson the soul of that Lord Chief Justice Scroggs who appears picturesquely in *State Trials*, vii, 929:

> In 1679 at the trial of Henry Carr, indicted for some passages in a weekly paper, the Lord Chief Justice Scroggs declared it Criminal at Common Law to "write on the subject of government, whether in terms of praise or censure, it is not material; for no man has a right to say anything of government."

Unfortunately, Mr. Burleson did not have exclusive possession of the soul of the ancient Scroggs. It manifested itself equally in many others at this time. The German terror had no sooner passed than it was succeeded by the Russian terror. The reason for the extraordinary hold which the latter obtained upon the American imagination is not far to seek. The attack of the Bolshevists upon private property, the dictatorship established by their leaders, and the avowedly international aims of their party were all hostile in principle to American institutions. Had these institutions remained in a vigorous condition there would have been nothing to fear. But, as we have seen, they had been so undermined for years that there was no stable intellectual support for them in the minds of the people. There was only emotion, rhetoric, and a submerged evil conscience. Even so, there was less danger of actual revolution in America than in any other civilized country. Men who are economically prosperous do not revolt. The more highly paid American laborer, whatever his wrongs, was in no mood to follow any of his starving European brothers. During all the years of alleged Bolshevist propaganda there was not a single proven instance of conspiracy to overturn the government—and two men, plotting to-

gether, are sufficient to constitute a conspiracy. But, on the other hand, there was real likelihood that political discussion would bring out the skeletons in our political closet. We dared not argue for the principles originally embodied in our institutions, because these principles had been too obviously denied in practice. Hence we chose to silence Bolshevism by using Bolshevist methods, and succeeded in silencing ourselves also. The suppression of Socialist and Communist doctrines marked the beginning of at least a decade during which there was to be no spontaneous political thinking in America.

Not unnaturally, the dread of Communism was greatest at first in New York, owing to the presence there of large numbers of Russians. On March 19, 1919, the New York Assembly appointed the notorious Lusk Committee of six members to investigate seditious activities in the state and report back to the Assembly. Now the New York Code of Criminal Procedure is particularly strict in regard to the use of search warrants: the warrant can only be issued by a magistrate when there is reasonable ground for suspicion that a crime has either been committed or is about to be; the warrant must be specific in its description of the objects to be seized; and these objects must be brought before the magistrate with a detailed written inventory. All of these legal provisions were soon violated by the activities of the Lusk Committee. On June 12th a squad of state constabulary under its direction raided the office of L. C. A. K. Martens, the official Soviet commercial agent in New York City, armed with a blanket warrant to seize "all documents, circu-

lars, and papers printed or typewritten, having to do with Socialist, Labor, Revolutionary, or Bolshevik activities; all books, letters, and papers pertaining to the activities of said Bureau, *all circulars and literature of any sort, kind, or character"* (italics ours). The magistrate who had been persuaded to issue this lawless warrant could hardly complain when the documents seized were lawlessly turned over to the Lusk Committee instead of to himself. The committee found in all this mass of material nothing of significance, but on June 21st it staged a similar raid on the Rand School, and this time it was fortunate enough to seize in the office files an unanswered letter *to* the school suggesting the possibility of spreading Socialist teachings among the southern Negroes, which the committee regarded as conclusive proof of a plan *by* the school to spread "Bolshevist propaganda among the negroes in the South." An abortive effort was thereupon made by the district attorney to dissolve the charter of the school. And the New York *Times* of June 28th carried front-page headlines—"Moves to Close the Rand School—District Attorney Takes Steps Toward Revoking Radical Institution's Charter—Planned Negro Uprising." (The *Times* presumably meant that the school, not the district attorney, had planned the "uprising.") By such means and with such little intelligence, the Lusk Committee finally got together the material for a bulky and very terrifying report which served as the basis of repressive legislation in other states as well as in New York. In New York State itself the efforts of the committee were mainly directed against freedom of teaching in

the schools; under its influence several enactments were passed which caused a temporary reign of terror in the schools of New York City, where teachers were dismissed on the most frivolous charges and all independent political thinking was effectually suppressed.

During this period of its dominance the committee also decided to purge the Assembly itself of dangerous elements. When that body reconvened on January 7, 1920, the five Socialist members, after being duly sworn in and taking part in the business of the day, were suddenly brought before the bar of the House by order of the newly elected Speaker and informed by him that they belonged to a subversive and unpatriotic organization and that he would entertain a resolution declaring their places vacant. This resolution, previously drafted by the Attorney-General as counsel for the Lusk Committee, was presented and passed, thus disfranchising 60,000 voters in New York City.

Within forty-eight hours Charles Evans Hughes, former governor of New York and justice of the Supreme Court, wrote a letter of sharp protest to Speaker Sweet. The Bar Association appointed a committee of non-Socialists, headed by Mr. Hughes, to appear before the Judiciary Committee of the Assembly, which, however, refused to listen to them. There was a so-called investigation of the five Socialists by the Judiciary Committee; two of them were charged with having made intemperate speeches and a third with having spit on the American flag at a public meeting in 1917, in the presence of two policemen, both of whom denied this accusation; the committee recommended the expulsion of all five mem-

bers. The Assembly waited until April 1st, when it was too late for a reëlection, and then expelled. Its action was defended in the New York *Times* editorial of April 2nd on the ground that it was as clearly a measure of national defense as the declaration of war against Germany. The seed of tares still sprouted.

II. John Wilkes and Victor Berger

In delaying the expulsion of the Socialist members until it was too late for another election, the New York Assembly was profiting from a recent experience of the Federal Congress. Victor Berger, who in 1878 at the age of eighteen had come to America from his native Austria, had long been one of the most prominent members of the Socialist Party in America. Without the milk of human kindness so endearing in Eugene Debs or the intellectual marrow of Norman Thomas, he was nevertheless generally regarded as a man of ability and integrity, particularly in his native state, which had elected him in 1911 as the first Socialist member of Congress, where he had served until 1913. The *Milwaukee Leader*, of which he was editor, from the beginning bitterly opposed the war, but without advocating violence or resistance to the draft. It was deprived of second-class mailing privileges in September, 1917, and Mr. Berger was indicted in February, 1918, under the Espionage Act; sentenced in December, 1918, to twenty years in prison, he appealed the case to the higher courts. Meanwhile, in November, 1918, he was elected to the House of Representatives, but when he appeared to be sworn in, objec-

tion was made and the question was referred to a special committee. This committee reported adversely, and on November 11, 1918, the House by an almost unanimous vote declared his seat vacant. The action was taken on the somewhat surprising basis of the Third Section of the Fourteenth Amendment designed to render ineligible to Congress any who had taken part in the Civil War on the Confederate side! But this was only an awkward and rather meaningless gesture. As the chairman of the special committee, Mr. Dallinger, said, "The one and only issue in this case is that of Americanism." Alas, yes, but not the Americanism of the Civil War. During that conflict both houses of Congress refused to expel members for speaking against the war, and at its very height, in 1864, the Democratic party on a platform in opposition to it elected members who were duly seated. Perhaps the Socialists of Wisconsin were Americans of the Civil War period; at any rate, they reëlected Mr. Berger on December 19, 1919, by an increased majority. And the House, being made up of Americans of Mr. Dallinger's type, again refused Mr. Berger his seat on January 20, 1920. Further possibilities of embarrassment for Congress were tactfully prevented by the governor of Wisconsin, who declared that another election would be "too expensive," whereby, as easily as that, he disfranchised 25,000 Wisconsin voters.

There is little that is new under the sun, particularly in the ways of tyranny. The mistreatment of Mr. Martens by the Lusk Committee and that of Mr. Berger by the federal Congress recall immediately the eighteenth-century experience of John Wilkes under the government of

George the Third. The cases are closely parallel except in their outcome. (For a detailed study, see Zechariah Chafee's *Freedom of Speech* [1920], chapter VI.) On April 23, 1763, the *North Briton*, edited by Wilkes, initiated a new policy in British politics by attacking members of the Ministry under their own names instead of decorously saying "Lord ——" or "Secretary ——." Thereupon Lord Halifax, one of the secretaries of state, issued a blanket warrant of exactly the type of those used by the Lusk Committee, and Wilkes's private papers were seized. Wilkes brought suit against nearly everyone engaged in this lawless act, grading his demands according to their responsibilities, £1,000 here, £4,000 there, etc. And he won all these suits. In 1763, though a man's private rights might be violated by the government, they were still occasionally restored. Wilkes was subsequently four times elected to Parliament from Middlesex, and four times denied a seat. But after a triumphant election as Lord Mayor of London, he was once more sent to Parliament and at last duly seated. The members of King George's government had not learned to abrogate the public will by the simple method of declaring further elections "too expensive."

III. Alexander Mitchell Palmer as Sherlock Holmes

In the spring of 1919, Alexander Mitchell Palmer, former alient property custodian, became Attorney-General of the United States. Born and brought up a Pennsylvania Quaker, he had wide business connections which may or may not have modified his Quakerism; thus, at

one time or another, he has been a director of the Stroudsburg National Bank, the Scranton Trust Company, the Citizens Gas Company, the Stroudsburg Water Company, the International Boiler Company, and the Potomac Joint Stock Land Bank. Quite in the best Quaker tradition, however, was his reassuring statement, "No man can go further than I will go in his earnestness to protect the people in the guaranty of free speech." No man, at least, could go further in his verbal assertion of such earnestness.

On April 30, 1919, the explosion of a bomb, mailed to ex-Senator Hardwick of Georgia, severely injured Mrs. Hardwick and a colored maid: soon after, in the New York City Post Office, more than two dozen similar bombs came to light, owing to shortage of postage. No discovery was made of the sender or senders; it has never been known whether the bombs came from some fanatic, from some group of violent anarchists, or, conceivably, from some group interested in maintaining the public fear of anarchy. In other words, it has never been known whether the bombs were sent to explode or to be discovered. On the night of July 2nd, however, intentional explosions occurred in seven towns; these injured no one personally, except an unfortunate night watchman killed in New York City, unless dubious fragments of torn clothing and what looked like bits of flesh indicated the death of some unknown person in Washington, D. C.; the greatest material damage done was to Attorney-General Palmer's house in Washington, where the beauty of the façade was seriously marred. Once more, no discov-

eries were ever made by the police, and contradictory inferences are equally plausible.

But to the Attorney-General, gazing sadly at his damaged façade, only one inference was conceivable. And, being a man of imagination, he developed the picturesque implications of his belief. On June 12th, in asking Congress for additional appropriations, he said, "We have received so many notices and gotten so much information that it has almost come to be accepted as a fact that on a certain day in the future, which we have been advised of, there will be another serious and probably much larger effort of the same character which the wild fellows of this movement describe as a revolution, a proposition to rise up and destroy the government at one fell swoop." The additional appropriations were granted, and in their expenditure the Attorney-General called to his aid a private detective named William J. Flynn, whom he described as "the greatest anarchist-expert in the United States." Presumably the terrorists were cowed by these vigorous preparations: at any rate, no further outrages occurred, either "on a certain day in the future" or on any other day. But with Mr. Flynn's assistance the Attorney-General was able to accumulate in time a card-index of 200,000 names, "giving," as he proudly reported, "detailed data not only upon individual agitators connected with the ultra-radical movement, but also upon organizations, associations, societies, publications, and special conditions in certain localities." But, apparently, it gave no data as to the authors of the bomb outrages.

In January, 1920, the country felt reassured that no revolution would occur, because in that month Emma

Goldman was deported. Miss Goldman was theoretically only a philosophical anarchist, believing in peaceful propaganda, but a keen sense of social injustice and a too eloquent tongue had sometimes led her into unwise utterances. She had been first arrested during a garment-makers' strike in New York City in the 'nineties for "inciting to riot," although there had been no riot; her error on this occasion had consisted in quoting from an article in the *Fortnightly Review* by Cardinal Manning in which he said, "A starving man has a natural right to his neighbor's bread"—a doctrine supported by the respectable authority of St. Thomas Aquinas—and for supplementing the quotation with her own words, "Ask for work; if they do not give you work, ask for bread; if they do not give you work or bread, then take bread." For this offense she spent six months in jail at Blackwells Island. She was then only in her twenties, but thereafter for many years, wherever there were serious labor troubles, she was likely to appear, a flaming messenger of courage. Arrested a score of times during these years, she was never convicted, which fact, if one remembers the resourcefulness of American courts, would seem, to an unprejudiced mind, conclusive proof of the lawfulness—although not necessarily the wisdom—of her speeches. But in 1917 she was convicted of advocating disobedience to the draft, and as an avowed anarchist, no matter of what type, she was subject to deportation when the indiscriminate law of 1903 already discussed was revived in 1919. In the American mind she had become a legendary figure of such exaggerated proportions that many a merchant and mayor slept more soundly after her departure. Yet in all

her twenty-five years of activity Emma Goldman had done less damage to American institutions than Attorney-General Palmer was to do in half as many months.

With Miss Goldman was deported Alexander Berkman, who as a youth during the Homestead strike of 1888 had attempted to kill one of the most hated of American capitalists, Henry Clay Frick, but who, after serving fourteen years of his twenty-one years' sentence, had been paroled for good behavior and had long since renounced all support of violent methods. But he, too, had opposed the draft and was an admitted anarchist; his case was essentially similar to Emma Goldman's. Along with Berkman and Miss Goldman there sailed on the deporting ship *Buford* fifty-one other anarchists, who were unconvicted of further crime than that of disbelieving in organized government. But there were 184 who were guiltless even of this, but were deported, still under the 1903 law, for mere membership in a workingmen's club, the Federation of Unions of Russian Workers, whose organic law, unknown to most of them, asserted that the working-class struggle would continue until, at some vague time in the future, the workers "take possession, by forcible social revolution, of all the wealth of the world." Anyone who has ever joined a club knows how unlikely it is that he will first read the constitution, yet for this omission these victims, after being seized, held incommunicado, and secretly examined, were finally deported at a few hours' notice. According to *The Deportations Delirium of Nineteen Twenty* (1923) by Louis Freeland Post, Assistant Secretary of Labor:

> [Secretary Wilson] had no funds for sending their families along with the deportees, for Congress negligently leaves the families of deported aliens in the plight of families of convicted criminals—and this notwithstanding the legal commonplace that alien deportees are not convicted criminals. . . . They had no opportunity to notify anyone; and not until the *Buford* was far out at sea were their relatives or friends or even the lawyers of those who had lawyers aware of any intention to deport them at that or any other approximate time.

The incident of the *Buford* was celebrated in an exultant pæan entitled "Bolshe Viki" from the pen of one Faith Baldwin, expressing the popular mood of the moment. Quotation of only two stanzas will perhaps suffice, since the poem is less notable for originality than for other qualities.

"What are the sirens shriekin' for?" said Percy Parlour-Red.
"To speed the guest, to speed the guest," the Loyal Native said.
"What makes you smile so grim, so grim?" said Percy Parlour-Red,
"I'm thinkin' of a muzzled hound," the Loyal Native said.

"For they're shippin' Bolshe Viki, you can hear the engines purr,
They are weighin' of the anchor, an' the decks are all astir,
They've pinned a number on him, an' they've branded him a cur,
An' they're shippin' Bolshe Viki in the mornin'!"

The deportations were the result of successful raids made by the Department of Justice in November. Encouraged by the Loyal Native's approval of his actions,

the Attorney-General, who was widely supposed to cherish presidential ambitions, now planned a more dramatic stroke—nothing less than one big all-American raid, nation-wide, to be conducted on January 2nd, so as to start the new year well. In its account of the preparations for the raid, the New York *Times* of January 3rd said:

> For months Department of Justice men, dropping all other work, had concentrated on the "reds." Agents quietly infiltrated into the radical ranks, slipped casually into centers of agitation, and went to work sometimes as cooks in remote mining colonies, sometimes as miners, again as steel workers, and where the opportunity presented itself as agitators of the wildest type.

One recognizes the familiar methods of the labor spy now ennobled as a "Department of Justice man." The methods of the actual raid were the same. Lawful meetings open to the public were broken up and all present, citizens and aliens alike, taken into custody; cafés, restaurants, fairs, dance-halls, and schools were invaded; homes were violated and personal effects seized; all, in the majority of cases, without the shadow of legal warrant. In Boston 400 prisoners were marched through the streets in chains and taken to Deer Island to be held incommunicado; one went insane and another committed suicide by leaping from the fifth story to the ground. In New York City 3,000 were arrested, 600 of whom were taken to Ellis Island. In Philadelphia, to quote again from Assistant-Secretary Post:

> The details of these arrests are not unlike those of the worst raiding in other regions of the United States—wholesale arrests regardless of Department of Labor warrants or American citizenship, coercive photographing in groups, private police examinations of the prisoners by search of person, "third degree" questioning, arbitrary release of some and arbitrary detention of others. From Philadelphia, however, there came the most explicit accusations of "third degree" treatment in the worst physical-force sense of that inquisitional term.

In Detroit 800 prisoners were confined for nearly a week in a single corridor of the Federal Building, with no outside air, a single toilet, and virtually no food except that brought by friends; 128 were confined for a like period under even worse conditions in a cellar room, twenty-four by thirty feet, of the Municipal Court Building; their sufferings were ended only by the successful appeal of a Citizens' Committee, headed by Bishop Charles D. Williams, F. F. Ingram, S. S. Kresge, and others, to the Department of Labor to end the intolerable situation created by the Department of Justice. In Chicago, the Republican district attorney had forestalled the Democratic Attorney-General by conducting a private raid of his own the day before, but Mr. Palmer was not denied all glory: his officers raided a Russian school of mechanics and seized the teachers and sixty-four pupils, along with a number of mathematical books whose formulæ were supposed to be secret anarchistic codes. West of the Mississippi the raids did not amount to much; the Western

states have usually preferred to perform their acts of injustice themselves rather than with the aid of the federal government.

And what finally came of all this sound and fury? In his official report the Attorney-General took credit for the seizure of "many firearms," but the "many" turned out to consist of only four, aside from a stack of guns used in amateur theatricals. The seizure of the latter was particularly unkind, since the raid itself, if one forgets the sufferings involved, was an amateur theatrical of the most amateurish sort. From approximately 6,000 arrests, 556 deportations were ultimately ordered by Assistant-Secretary Post, to whom, owing to the illness of Secretary Wilson, fell the unpleasant duty of carrying out the law of 1903; of these deportations not a single one was for any actual deed of violence. To quote yet once again from Mr. Post:

> I had to order deportations of aliens whom not even a lynching mob with the least remnant of righteous spirit would have deported . . . from a frontier town. . . . In nearly every deportation case the record disclosed nothing but some variety of proof of mere technical membership in one or another organization which the Secretary of Labor had held to be within the proscription of the alien deportation laws. And in most of those cases it was apparent that the alien had neither suspicion nor cause for suspicion that the organization was unlawful.

Finding that the Department of Labor was unwilling o deport everybody who chanced to be arrested, the

Department of Justice went on its way alone. Thus it held one Andrae Salsedo incommunicado for two months, without granting him even a hearing before an immigration inspector, until in despair he plunged from a window of the room where he was detained, high up on Park Row. What grisly third degree examinations may have lain behind his act may be surmised. But the spattered brains of Andrae Salsedo were not considered a smutch upon the Attorney-General's gown in the eyes of the American people—or at least in the eyes of their "representatives." As recorded in *Who's Who in America*, at the 1920 national convention of the Democratic Party in San Francisco, Mr. Palmer received 267 votes for the nomination to the Presidency. He was thus, apparently, considered at least a worthy candidate for the highest office in the land—although, of course, as it turned out, far less worthy than his Republican rival, Warren G. Harding. In this matter of relative rank the national judgment, if it can be called the national judgment, was possibly correct.

Unrecorded in *Who's Who in America* is another item connected with the close of Mr. Palmer's political career. An indictment signed by twelve leading lawyers and jurists in the United States—Roscoe Pound, Zechariah Chafee, Felix Frankfurter, Ernst Freund, Tyrrell Williams, Frank P. Walsh, Swinburne Hale, David Wallerstein, R. Gratz Brown, Alfred S. Niles, Jackson H. Ralston, Francis Fisher Kane—was formally brought before Congress by Senator Thomas J. Walsh. It charged the Attorney General with six specific offenses—cruel and unusual punishments, unwarranted arrests, unreasonable

searches and seizures, use of provocative agents, compelling people to be witnesses against themselves, misuse of office and squandering of public funds. The subsequent history of this rather serious-looking indictment is interesting. It was referred to the Senate Committee on Judiciary and by it referred to a sub-committee; hearings were heard from January 19 to March 31, 1921; after that, nothing was done for over a year. At last, in order to force some action, Senator Walsh presented a report; this led to a counter-report from the chairman, Senator Sterling. The committee rejected Senator Walsh's report, sidetracked Senator Sterling's, and reported nothing back to the Senate. Silence is the best of whitewashes. On February 5, 1923, however, Senator Walsh obtained the Senate's permission—since no one was any longer interested in the case—to have his own and Senator Sterling's report published, and this was done in the *Congressional Record*, February, 1923, pp. 3051-3073. But it evidently requires more than six offenses of the type of those cited above to obtain any senatorial action against an Attorney-General of the United States.

IV. The Unpopular Louis F. Post

Meanwhile, what of Louis F. Post, Assistant Secretary of Labor, who had, single-handed, attempted to restrain the Department of Justice within the bounds of law, or, at least, had refused to coöperate with it in transgressing those bounds? After a violent attack upon him launched by Congressman Albert Johnson of the State of Washington on April 12, 1920, an impeachment resolution was

introduced in the House of Representatives by Congressman Homer Hoch of Kansas. This was referred to the House Rules Committee, which held three meetings without showing any disposition to permit Mr. Post to appear in his own defense; finally, on his demanding the right to be heard, he was summoned on May 7th. The result was a surprise to his accusers. It was reported as follows, on May 8th in the *Spokesman-Review* of Spokane, Wash., in a region particularly unfriendly to Mr. Post:

> Louis F. Post, seventy-one, Assistant Secretary of Labor, mentally supple, quick-witted, in his own defense today before the House Rules Committee, was a living exhibit of vigor and sustained power. Despite his seventy-one years he seemed twenty-five. He pounced upon Attorney-General Palmer one minute, then hurled a charge of "non-lawful" performance at Anthony Caminetti, Commissioner-General of Immigration, and landed a terrific wallop here and there to the House Immigration Committee of which Albert Johnson of Washington is chairman.

A similar account was given in the *New Republic*, May 26, 1920:

> There were passages at arms in which somehow Mr. Post refused to remain in the rôle cast for him by the Congressional committee—that of an Unpatriotic Worm crossed with an Impractical Theorist,—and became instead the Guardian of old-fashioned Americanism, and the Curator of Facts. At such

> times the hearing-hearers were treated to dialogues like this: . . . *The Worm*: "You have to define what the prisoner means by Anarchy. Often he will call himself an Anarchist when his meaning falls under no accepted definition. I fancy all of us here in this room are Anarchists in the sense that we need no law, no enforcement of law, to prevent us from picking each other's pockets." *Mr. Pou*: "I beg to be excused from being called an Anarchist under that definition or any other." *The Worm*: "I excuse you."

After this, nothing was heard of the impeachment. But now the executive committee of the American Legion directed the National Commander to "take all steps necessary to secure the dismissal of the said Louis F. Post at the earliest possible moment." A special committee appointed by the National Commander submitted a statement to President Wilson, who referred it to Secretary Wilson. The latter replied: "Louis F. Post is one of the truest Americans I have ever come in contact with . . . and I am satisfied ranks amongst the ablest and best administrative officers in the government service."

One reading the accounts of 1919-20 can but echo from a distance Secretary Wilson's intimate judgment. The record shows Mr. Post, who has since died, to have been one of the few spiritually great Americans of the war period. Suddenly called from a relatively obscure position to a task of supreme importance, the fine old man did his duty unswervingly, swayed neither by his personal sympathies against the unwise law he was called upon to administer, nor by any fear of the powerful forces

which demanded that he administer it unjustly. Witty and humane, he stands out, in a murky period, as a truly civilized man. The American people owe his memory a still unrecognized debt of gratitude. Had not Louis F. Post checked, when they were in full career, the runaway horses of Attorney-General Palmer, there is no knowing to what further untoward collisions they might have drawn the nation.

V. Guilt by Association

> One of the fundamental conceptions of our law, gentlemen, of Anglo-Saxon law, is that guilt is personal and not by association. Now therein it differs from the law, for instance, of Prussia. Prussia, under the leadership of Bismarck, enacted the anti-socialist laws against the then budding social democratic party of Germany, and in these anti-socialist laws men became offenders by reason of membership in the socialists' associations. Now that idea that guilt is not necessarily personal but can result from association only, is absolutely abhorrent to every American tradition or conception of criminal justice.—Alfred Bettman, *before the Committee on Rules of the House of Representatives, January 23, 1920.*

However un-American, however intolerable to the spirit of the Founding Fathers, however irrational in principle, the doctrine of guilt by association was incorporated in the federal statutes by the Anarchy provision of 1903, was revived by the United States Government

in 1919, flourished exceedingly in America for a number of years after the war, and has never been definitely rejected. Its results were very completely illustrated in the State of California, which for nearly five years made a determined effort to enforce its criminal syndicalism law of 1919, which reads in part:

> Any person who . . . organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach, or aid and abet criminal syndicalism . . . is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than fourteen years.

The utterly unauthentic accounts which appeared in the public press of the Centralia mob-riot on November 11, 1919, to be discussed in a later chapter, led to a widespread belief on the Pacific coast that the I. W. W. was an organization wedded to violence. Actually, of course, the distinctive tenet of the I. W. W. is simply that of syndicalism everywhere: a program to improve working-class conditions by industrial strikes instead of by political action. Now strikes, no doubt, tend to lead to violence, but they are still legal in this country. In the whole history of the I. W. W. there have probably been fewer deeds of lawlessness proved against it than those of which the United States government was guilty on the single night of January 2, 1919. But the character of its membership, composed largely of unskilled and migratory laborers, has made it particularly objectionable to the sober

citizen with a property stake in the business prosperity of his local community. Together with the I. W. W., as held to be within the scope of the California statute, was the Communist Labor Party, an organization which, ironically, had split off from the Communist Party because of the radical nature of the latter's platform, and which was finally considered by Secretary Wilson, after some study, not to come under the provisions of the Federal statute. In the 264 criminal syndicalist trials in California from 1919 to 1924 the state usually attempted to prove the criminal aims of the I. W. W. or the Communist Labor Party by citing individual I. W. W. acts of sabotage or individual incendiary speeches made before the national meeting of the Communist Labor Party. The principle of guilt by association was made to work both ways: the individual member was held to be guilty of all the official acts of the organization and the organization was held to be guilty of all the unofficial acts of the individual member.

Exactly as during the war, so now in peace the state utilized the assistance of private "patriotic" societies, especially that of the Better America Federation, an association of particularly bellicose business men in southern California, of which considerably more will be said in a later chapter. And the labor spy, already used by the state in the Mooney trial of 1917, was by now apparently an indispensable adjunct of the government. Stool-pigeons, admittedly men of the lowest character, habitual criminals by their own confession, were employed as professional witnesses, one appearing in almost every trial. Certain items of testimony given in George W.

Kirchwey's *Survey of the Workings of the Criminal Syndicalism Law of California* (1926), published by the American Civil Liberties Union, may be read with interest:

> On cross-examination of one witness:
> *Mr. Allen*: "Where do you get your money to live on now mostly?" *A.* "Well, I guess through these trials." *Q.* "That has been the case now for how long?" . . . *A.* ". . . I guess practically ever since they started prosecutions under the criminal syndicalism law."
>
> Justice Plummer . . . referring to one witness: "The witness was allowed to and did state sufficient to show himself to have been one of the most reprehensible characters thinkable. He stated on the witness stand that he had never told the truth before in his life. He admitted participation in numberless atrocious offenses. It is unfortunate that anyone confessedly guilty of so many despicable crimes must be used as a witness."

"Unfortunate" may seem to some an unduly mild word. How long will a government that uses such witnesses to send its citizens to prison for from one to fourteen years continue to retain the respect and devotion of the people?

The most notable trial under the California law was that of Charlotte Anita Whitney, for seven years secretary of the Associated Charities of Oakland and the first juvenile probation officer of that city. Miss Whitney, a woman of education and culture, belonging to that high

type of social worker represented by Jane Addams in Chicago and Lillian Wald in New York City, had for years given her time, money, and energy to the relief of the unfortunates in her community. A pronounced pacifist, she always used her very considerable influence among the workers to oppose any act of violence. But she was a member of the Communist Labor Party and was present at a meeting where, as was brought out during the trial, Police Inspector Fenton Thompson had secretly placed a maroon piano cover behind the glass doors of a bookcase. All the efforts of the defense were unable to prevent this maroon piano cover from swelling in the heated atmosphere of the court-room into the dreaded red flag of Russia waving over the heads of a desperate band of criminals. Miss Whitney was sentenced to prison and, five years after the trial, when the Supreme Court of the United States, acting on a technicality, refused to take jurisdiction, to prison she went, to serve in San Quentin beside thieves and hammer murderesses.

Much disappointment was expressed in liberal circles over the Supreme Court's action, but just why it is a little difficult to see. The court had already tacitly accepted the principle of guilt by association in upholding the anarchy provision of 1903. Its record, as indicated in a previous chapter, hardly justified anyone in expecting it suddenly to appear as a champion of the rights of labor.

This and the previous chapter, I may be told, have dealt with ancient history, now happily dead and buried. Why dig it up again? Conscientious objectors and espionage sufferers have long since been set at liberty, the

Lusk laws were repealed in 1923, Alexander Mitchell Palmer is now only a private citizen, and today in 1930 Miss Whitney is once more free. Yes, Miss Whitney is free, but Mooney and Billings, unjustly sentenced long before her, are not free; the victims of the Centralia mob-madness are not free; the flag fetich has been revived in California during the last twelve months; and the horrors of Gastonia are only a few weeks behind us. Wrongs have been belatedly rectified in individual instances; but new wrongs have followed, and will follow, as long as the underlying principles remain undisowned. And the main principles of all this war and post-war legislation, justified, as we shall shortly see, by the Supreme Court of the United States, are now a part of the law of the land. Not with the past have these two chapters dealt, but with some dim era of a probable future, of which they shadow forth merely a pallid adumbration.

CHAPTER V

Twisting the Constitution's Tail

In regard to a government that is free and one that is despotic, wherein does the difference consist? . . . In the liberty of the press.

—Jeremy Bentham

We may well wonder, in view of the precedents now established, whether constitutional government as heretofore maintained in this republic could survive another great war even if victoriously waged.

—Charles Evans Hughes

The victories of liberty of speech must be won in the mind before they are won in the courts. In that battlefield of reason we possess new and powerful weapons in the dissenting opinions of Justice Holmes and Brandeis. Out of this long series of legal defeats have come a group of arguments for toleration that may fitly stand beside the "Areopagitica" and Mill's "Liberty." The majority opinion determined the cases but these dissenting opinions will determine the minds of the future.

—Zechariah Chafee

CHAPTER V

Twisting the Constitution's Tail

I. The Forgotten Bill of Rights

The forests of modern law are so intricate and encumbered by so much falling timber that the layman who ventures therein is likely to fare badly. He is in the position of some individualistic savage who should have ventured to protest against the decisions of the medicine-man. The latter, by his magic, or more potent means, could be counted upon to give short shrift to the offender. None the less, our laws, although interpreted by lawyers, are enacted by laymen, and it is the layman, rather than the lawyer, who runs the greatest risk of being fined, jailed, or imprisoned for their violation. Hence, as having a vested interest in the subject, it would seem that the layman in his folly has still a right to be heard.

In dealing, however, with the increasingly hostile relations between the federal Constitution and the Supreme Court of the United States, layman and lawyer alike suffer from a peculiar disadvantage. The Supreme Court enjoys in America a reverence which is at first sight somewhat difficult to explain. Throughout its long history the majority of its members have not been jurists of pre-

eminent distinction, and at least one of its most noted decisions, that in the famous Dred Scott case, has been popularly considered a monument of injustice. Nevertheless, its deserved reputation for the personal integrity of its members, and, probably still more, the fact that its is the final word in legal authority, have conspired of recent years to make the Supreme Court an object of superstitious awe.

If the Better America Federation, which, in the intervals between attacks upon the I. W. W., has still had time to offer prizes for essays on the American constitution, came upon a certain section of that document unknowingly, it would certainly condemn it as "anarchistic" or "Bolshevistic." The teaching of the Constitution, now required by law in many states, may well prove a dangerous measure unless provision is also made for federal judges, or other competent parties, to visit the schools and explain the actual meaning of the document. Otherwise, the ingenuous youth of the land may grow up supposing that American citizens possess all sorts of rights that are in no wise theirs. They may then attempt to exercise some of these assumed rights, in which case they will get into trouble. Certainly some one should be there to explain that American citizens once enjoyed these privileges but do so no longer, and that in these cases the Constitution really means the opposite of what it says. Or perhaps the same result could be achieved by neglecting to print those portions of the Constitution which have been nullified or by printing them in fine type. This ought to occasion little difficulty even to the

printers, since most of these portions fortunately occur in a single block formerly known as "The Bill of Rights." At the cost of some chronological retracing of steps, it is necessary to go briefly into the history of this forgotten section of the Constitution.

The term "Bill of Rights" was derived from the famous Bill of Rights of William and Mary, the first fruits of the Revolution of 1688. This bill reënacted the traditional rights of Englishmen, supposed to have been secured by the Great Charter of 1215 but suppressed in various ways during the Stuart reigns. As Sir William Blackstone wrote in 1765, "The Great Charter protected every individual of the nation in the free enjoyment of his life, liberty, and property unless declared to be forfeited by the judgment of his peers or the law of the land." Over a century earlier, Sir Edward Coke had expressed the same thought more picturesquely—"Magna Carta is such a fellow as will tolerate no sovereign." The American Constitution could trace its ancestry for at least five hundred years.

The traditional rights of Englishmen are summed up cautiously by Blackstone—who, it must be remembered, was a Tory—under the two headings of absolute and relative rights. "The absolute rights of individuals . . . usually called their liberties" are also divided by Blackstone into two classes—primary and secondary. Primary rights embrace:

(1) the right of personal security—preservation of life, limb, health, and reputation
(2) the right of personal liberty—freedom to go

wherever one wishes, unless restrained by due course of law

(3) the right of private property.

Secondary rights embrace:

(1) the right of petition
(2) the right to bear arms
(3) the right to seek justice in the courts of law.

Relative rights include the prevention of the quartering of soldiers in time of peace, the prevention of unreasonable searches and seizures, the prevention of cruel and unjust punishments. All these rights—primary, secondary, and relative—indorsed by what Albert J. Nock has finely characterized as "the common conscience," and recognized by even such a conservative as Blackstone, had thus been the accredited possession of Englishmen long before the American Revolution. When violated by the Ministers of George the Third, both at home and abroad, they were defended in what was virtually a civil war, waged by words alone in England, by both words and arms in the Colonies.

During the contest another long-latent right emerged to clear definition—that of freedom of speech. Striven for with only partial success in England until some years after the American Revolution, it was vigorously asserted by the Colonists from the beginning of the struggle. In the address issued by the Continental Congress to the inhabitants of Canada, on October 26, 1774, urging them to make common cause with the American Colonies, and pointing out the advantages which the latter enjoyed—

representative government, trial by jury, liberty of person, easy tenure of land, and freedom of the press—the blessings of the last-named were described in words that have never been surpassed:

> The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiment on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officials are shamed or intimidated into more honorable and just modes of conducting affairs.

After the separation from England, Bills of Rights were included in the newly adopted constitutions of the three most important states, Massachusetts, Pennsylvania, and Virginia. None was inserted in the original form of the federal Constitution because this was considered unnecessary, since Congress had not been empowered to make any encroachments upon individual liberty. Nevertheless, the omission drew forth immediate protests in the state conventions. Three of the states embodied declarations of rights in their ratification, and two expressly demanded an amendment. This amendment, or rather the first ten amendments, compiled by Madison from a much larger number submitted, was passed by Congress during its first session and was speedily ratified by all the states, becoming part of the Constitution on November 3, 1791. Thus, with their war for existence only eight

years past, with the forts of the Northwest still in British hands, with the continuance of French friendship doubtful, with perils behind, around, and before them, the Fathers reiterated, this time in detail, their faith in liberty. And the first and most important of all these ten amendments proclaimed the doctrine of freedom of speech, equally in time of peace and in time of war. As Judge Charles F. Amidon has said:

> The framers of the Constitution knew that the right to criticise might weaken the support of the Government in time of war. They appreciated the value of a united public opinion at such a time. They were men who had experienced all these things in the war of the Revolution, and yet they knew too that the Republic which they were founding could not live unless the right of free speech, of freedom of the press was maintained at such a time. They balanced these considerations and then wrote the First Amendment.

This amendment read: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances." The other amendments prohibited unwarranted arrests, unreasonable searches and seizures, multiple trials for the same offense, excessive bail and fines, cruel and unusual punishments. So far as written law could make it so, the personal liberty of the citizen under the government of the United States was now secure. The language of the

amendments was so clear and definite, revealing their intent so plainly, that one would have supposed there was little chance of misconception. All the demands which could well be made in the name of liberty were granted; all the known safeguards of liberty were introduced. As long as the American people remained of the same mind as they were in 1791, there could be no danger. But how if they did not remain of the same mind? If the spirit and the temper of the people change there is little help in the written word.

II. The Metamorphosis of the Fourteenth Amendment

After the Civil War, when the Southern states passed laws limiting the newly acquired citizenship of Negroes, to prevent such laws Congress in 1866 passed the Fourteenth Amendment, ratified in 1868. Its intent was to protect the personal rights of citizens, already guarded in the Constitution against infringement by Congress, equally against violation by the states. It reads:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Its meaning seems tolerably clear. But this is what the Federal Industrial Relations Committee in 1915 had to say of its actual working out in practice:

> We are informed by counsel who have examined the cases involved that the Fourteenth Amendment has had no appreciable effect in protecting personal rights. According to the existing decisions, the due-process clause does not guarantee the right of trial by jury, nor does it necessitate indictment by grand juries, nor has it restrained arbitrary arrests and imprisonments on the part of the state governments when men are kidnapped in one state and carried into another. . . . It is quite clear that it not only has failed to operate to protect personal rights, but has operated almost wholly for the protection of the property rights of corporations.

During the half-century after the Civil War, as we have seen, a new "right" was discovered, destined to swallow all the rest—the sacred right of business. In legal parlance it goes by a slightly more high-sounding name, "the right of contract." The ultimate guardian of this new-found right, strangely enough, proved to be the Fourteenth Amendment, which says nothing about it.

In 1905 occurred the famous case of *Lochner* vs. *New York*, in which Justice Oliver Wendell Holmes began his long and honorable career of dissent. The New York state legislature had passed a ten-hour bakers' law. This law was sustained by the Appellate Court of New York, but was declared unconstitutional by the United States Supreme Court on the ground that it violated the Fourteenth Amendment. Justice Peckham, who wrote the majority opinion, said, "the general right to make a contract in relation to his business is part of the liberty of the indi-

vidual protected by the Fourteenth Amendment to the federal Constitution." This liberty of contract is evidently very different from any of the "liberties of the individual" which were mentioned in the first part of this chapter. The rights to personal protection, to freedom of locomotion, to impartial justice, even to freedom of speech, are all rights which do primarily concern the individual. But a contract is by nature social. A man may walk alone from Maine to Florida, he may talk though no one listens, but he cannot make a contract by himself. A contract may involve two or may involve two thousand; it must involve more than one. The doctrine of free contract was a product of the Manchester school of *laissez faire* economists, culminating in Herbert Spencer. It had nothing whatever to do with the traditional individualistic liberties of Americans. It was unknown to Blackstone, to the Founding Fathers, or to the writers of the Fourteenth Amendment. But all this made no difference. If the decision of the Supreme Court was not in harmony with what the amendment meant when it was passed, it was what the amendment ought to have meant and should mean henceforward.

Justice Peckham went on to argue that the amendment did not hamper the legitimate police power of the state, but only prevented "an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty"—such as this interference with the right of bakers to overwork. That the bakers did not want this precious right was nothing to the purpose; it belonged to them and they must keep it.

Other similar cases followed. In *Adair* vs. *United States*, in 1908, a federal law which prohibited railroads engaged in interstate commerce from discharging employees because of membership in labor unions was held unconstitutional (Holmes again dissenting). In *Coppage* vs. *Kansas,* in 1915, the right of the employer to make his own terms of employment was emphatically enunciated by the court through the mouth of Justice Pitney. As the worker has "the constitutional right to decline proffered employment unless the employer will agree not to employ any non-union man, the employer should have the same right not to take into his service a person who would not agree to stay out of the union." This is the old argument of the lion to the lamb, "I grant that you have absolutely the same right to eat me that I have to eat you; hence we are on a perfect equality." To be sure, the court admitted that the equality was theoretical, not actual. "Employees as a rule," said Justice Pitney, "are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract in purchase thereof"; but he then dismissed the matter with, "Wherever the right of private property exists, there must and will be inequality of fortune."

Finally, in 1923, the federal minimum-wage law, designed to protect women in the District of Columbia from employment at less than a living wage, was declared unconstitutional (Holmes of course dissenting and in this case Taft also). In this instance, however, the reason in the bakers' ten-hour case was discarded. The

majority opinion, written by Justice Sutherland, declared that the minimum-wage law exacted from the employer "an arbitrary payment for a purpose and upon a basis having no causal connection with his business," namely, "the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals." This Supreme Court decision was far more reactionary than the practice of the better class of business men themselves, who had long since begun to realize that the health of their employees has a very direct "causal connection" with the success of their business.

In view of such decisions, is it surprising that many of the workers should despair of legal methods and turn to direct action? If one seeks the source of the I. W. W. or the Communists he does not need to go to Russia; he will find it in the unjust—the word is carefully chosen —decisions of American courts.

III. The Nullification of the First Amendment

The Constitution, as was pointed out above, places no limitations upon freedom of speech in time of war any more than in time of peace. The current arguments that there must be such limitations find no sanction in the teaching of the Fathers. To such suggestions they would certainly have replied that it is precisely during the heady excitement of war, when vast interests are at stake, that both private liberty and the public welfare demand especial protection for freedom of discussion; they might even have presciently added that liberties sacrificed in

war would not be regained in peace. This doctrine was emphatically reaffirmed by the Supreme Court immediately after the Civil War in the famous Milligan case:

> The Constitution of the United States is a law of rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men at all times and under all circumstances. . . . No doctrine is more pernicious than that any of its great provisions can be suspended during any of the great exigencies of government. That leads directly to anarchy and despotism. . . . Whatever his desert or his punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort than that he should be punished at all.

Yet in 1917 when we declared war on Germany—although we were in alliance with four powerful nations, although three thousand miles of ocean and three navies intervened between us and our foe, although there was no danger of invasion and our national existence was unthreatened—nevertheless, within three months Congress passed a law "abridging the freedom of the press." And within another year, and still before actual fighting had commenced, it amended the law so as to destroy what little freedom remained.

Now was the moment when the Supreme Court might have redeemed itself. A unique opportunity had come to it, such as had never arisen in all its history, to defend American institutions in their hour of utmost need. A

measure clearly violating the Constitution and fundamentally changing national policy had been passed in response to a frenzy of war fever. Had the Supreme Court then defended the nation against itself and appealed from Philip drunk to Philip sober, it might have saved the United States from who knows how many shameful decades. But the court could see no abridgment of free speech in an enactment stating (in the amended form) "Whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States . . . shall be punished by a fine of $10,000 or imprisonment for not more than twenty years or both." Why, the law itself was disloyal, profane, scurrilous, and abusive toward the Constitution of the United States, for it made nothing less than a mockery of the First Amendment. Nay, Congress actually succeeded in violating two articles of the Constitution at the same time, the Eighth Amendment prohibiting excessive fines as well as the First Amendment—for when conspiracy to overthrow the government by force is punishable by only six years in prison and a fine of $5,000, a punishment of twenty years and $10,000 for sneering at the flag is, if words have any meaning, "excessive." It takes no lawyer to understand the First or Eighth Amendment. It takes no lawyer, alas! to understand the Espionage Act. It only takes a lawyer to under-

stand that the amendments and the Act are in no way inconsistent with each other.

IV. The Case of Eugene Debs

That incorruptible and austere court
Of old men to this old man made report:
They made report, this row of staunch patricians,
Unto the bald, lone, tall man of the plebs;
They bore no grudge, they took no gold,
They may have loved him . . . for they too were old;
But, seated in their ancient nine positions,
They sealed the prison sunset-years for Debs.

—William Ellery Leonard.

Whatever may be thought of the constitutionality of the Espionage Act, it was the kind of law that readily lends itself to abuse and therefore requires the most strict interpretation. Instead, however, of interpreting the law strictly, the court actually broadened the scope of the measure and made it, if possible, even more tyrannical than it was before.

This appeared clearly in the first important case, that of Eugene Debs.

The character of the accused cannot be left out of account in a criminal trial. Debs was perhaps the best loved man in America, and his conviction brought a shock to over a million people. For forty years he had devoted his strength to the cause of the poor, striving for shorter hours of labor, for decent wages, for education, for every movement calculated to benefit their con-

dition; always opposed to force and violence, always struggling to improve the laws. But other men have done this and have not been loved. Debs was also a Socialist: other Socialists have been hated, but not Debs. Even those most ready to point out the frequent looseness of his reasoning acknowledged the sweetness and sincerity of the man. "While the overwhelming majority of the people here are opposed to the social and economic theories of Mr. Debs," wrote James Lyons, mayor of Terre Haute in 1907, "there is perhaps not a man in this city who enjoys to a greater degree than Mr. Debs the affection, love, and profound respect of the whole community." Over and above his beliefs was his radiant personality. "His spirit is more beautiful than anything I have seen in any man of my time," said Max Eastman. " 'Gene Debs is the most lovable man I ever knew," said Eugene Field. "Kindest, gentlest, bravest of men," said John Haynes Holmes. "The grasp of his hand is comforting, the look at his lighted face is an inspiration," said Edwin Markham. The humble, loving spirit of Debs, humble yet stainlessly proud, throbs through his words to the judge that sentenced him:

> Your Honor, years ago I recognized my kinship with all living beings, and I made up my mind that I was not one bit better than the meanest of earth. I said then, I say now, that while there is a lower class, I am in it; while there is a criminal element, I am of it; while there is a soul in prison I am not free. . . . I could have been in Congress long ago. I have preferred to go to prison. The choice has

> been deliberately made. I could not have done otherwise. I have no regret. . . . Your Honor, I thank you, and I thank all of this court for their courtesy, for their kindness, which I shall remember always. I am prepared to receive your sentence.

And this man, the greatest lover of humanity in the whole United States, was sentenced to ten years in prison. Why?

Debs was sentenced under the unamended Espionage Act for a speech delivered at Canton, Ohio, on June 16, 1918, in which, it was charged, he willfully obstructed the enlistment service. Yet there was not a word in the speech concerning enlistment. It was not made to soldiers; it was made to a state convention of the Socialist Party. But it attacked the war and the policy of terrorization that had accompanied the war. This was enough. Debs knew when he made the speech that he was risking a term in prison; therefore, argued his critics, he had no right to make it.

Still, it must be admitted that there is a great difference between, on the one hand, making a speech to one's fellow-citizens in opposition to a war, and, on the other, directly obstructing the enlistment of drafted soldiers. The one seeks to change national policy by an appeal to public opinion; the other seeks to prevent the enforcement of national policy without changing it. There is all the difference that there is between the senator who openly opposes prohibition and the one who secretly encourages bootlegging. By its identification of two very different actions the Supreme Court established a pre-

cedent which will make it difficult, if not impossible, in the future to oppose a war actually in progress. This means in effect either that it is inconceivable that the United States should become engaged in an unwise or unjust war, or else that in such circumstances it will be the duty of the citizen to stifle his conscience, and the duty of the patriot to push the nation still further on its course of folly or injustice. A strange duty, and a strange patriotism!

Debs could never have been convicted even under the Espionage Act but for the revival of a theory of legal interpretation which had been popular in the time of George the Third, but which for over a century had been supposed to be outlawed in Anglo-Saxon countries. This was the theory of "constructive" crime. As shown in our second chapter, for several decades before the World War the American people had been drifting toward an acceptance of this principle of tendency legislation. Under it, to repeat once more, a man should be convicted not only if he commits a crime or if his words directly incite to crime but also if they have a "tendency" to incite to crime. No evidence was introduced to show that anyone had actually resisted the draft as a result of listening to Debs. On the other hand, many conscientious objectors had actually resisted the draft as a result of reading the New Testament. If the notion of constructive crime had been applied consistently, every publisher of the Bible should have gone to prison before Debs. Well may Zechariah Chafee write, "The most essential element of free speech is the rejection of bad tendency as the test of

a criminal utterance." The words of Jefferson concerning religious liberty apply equally in all other fields:

> To suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he, being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own.

V. The Minority of Two

In one of the early cases, *Schenk* vs. *United States*, in which the issue was actually that of the bootlegger of free speech, the defendants having secretly mailed to drafted men circulars urging resistance, Justice Oliver Wendell Holmes wrote the majority decision sustaining the lower courts. In this decision he attempted to find a *via media* between unrestricted free speech and unrestricted suppression, by setting forth a definite principle:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

This limitation of the right of suppression to cases of "clear and present danger" was the high-water mark of liberalism attained by the Supreme Court. Owing to the

well-deserved reputation of Justice Holmes as a social philosopher, his phrase has since become something of a rallying cry. It is accepted inconsistently, as it seems to me, even by Zechariah Chafee, who takes it as the basis for the main argument of his *Freedom of Speech* (1920). Undoubtedly, it reduces tendency legislation to a very minimum, but tendency legislation it is, nevertheless. "Danger that they will bring about"—not certainty that they have brought about. There is still a fundamental difference between this and the rule laid down by Thomas Jefferson which it seems to approach:

> It is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.

The principle of Justice Holmes still leaves the application of the law in any given instance a matter of conjecture, since men's conception of danger is notoriously subjective: a danger clear to one will be laughed at by another. Thus the principle itself is clearly a dangerous principle, to be applied successfully only by men of Justice Holmes's caliber—and such men are few. These objections are borne out by the history of the subsequent espionage cases that came before the court, where the balanced judgment of Justices Holmes and Brandeis saw no causes of peril in words which led the rest of the court to their decision.

First, there was the Abrams case. On August 23, 1918, leaflets were thrown from a window at the corner of

Houston and Crosby Streets in New York City, denouncing the sending of American troops to Vladivostok, and reiterating some commonplace Socialist admonitions derived from the Communist Manifesto of 1848. That night a group of young Russians were arrested, all between the ages of twenty and thirty, including a girl of twenty-one, Molly Steimer. One of the prisoners, Schwartz, died before the trial; there was suspicion that his death was due to "third degree" injuries. The defendants were placed on trial, October 10, 1918, under the amended Espionage Act, before Judge Clayton of Alabama, chairman of the Judiciary Committee of the House of Representatives. The Russians had committed one act, they were tried for another; they had protested against the invasion of their native country, they were tried for opposing the war with Germany. The testimony of Raymond Robins and Albert Rhys Williams to show that the Russian expedition was not a legitimate part of the war was excluded by Judge Clayton with the remark, "The flowers that bloom in the spring, tra la, have nothing to do with the case." Further instances of the Alabaman's wit are given in Chafee's *Freedom of Speech*:

> The witness said that he was an anarchist and added that Christ was an anarchist.
>
> "Our Lord is not on trial here. You are."
>
> "We will now," said Mr. Weinberger, "ask the witness about his other writings. The Holy Alliance ——"
>
> "Cut out the Holy Alliance. That is not in the issue."

"When our forefathers of the American Revolution" —— the witness began, but that was as far as he got.

"Your what?" asked Judge Clayton.

"My forefathers," replied the defendant.

"Do you mean to refer to the fathers of this nation as your forefathers? Well, I guess we can leave that out, too, for Washington and the others are not on trial here."

Abrams explained he called them that because "I have respect for them. We all are a big human family, and I say 'our forefathers.' . . . Those that stand for the people, I call them father."

All the defendants were convicted; one Rosansky, who had merely thrown the leaflets from the window without knowing what was in them, was sentenced to three years in prison; Molly Steimer to fifteen; the others to twenty. The conviction was upheld by the Supreme Court. Justice Clarke, who wrote the majority decision, had apparently never heard of the hackneyed Communist Manifesto:

> Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. "Workers of the World! Awake! Rise! Put down your enemy and mine. . . . Capitalism" this is clearly an appeal to the "workers" of this country to arise and put down by force the government of the United States.

This identification of capitalism with the government of the United States made by a justice of the Supreme

Court has its interest. All but two members of the court, Justice Holmes and Brandeis, agreed that there was a clear and present danger that the United States government might be overthrown by the words of five ignorant Russians. But the old lion of liberty, Justice Holmes, was now thoroughly aroused. In ringing words he castigated the decision.

> In this case sentences of twenty years' imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the government has to publish the Constitution of the United States now vainly invoked by them.

The alliance of two against many was henceforth unbroken. Sometimes it was Justice Holmes who wrote the minority report, sometimes it was Justice Brandeis, but they spoke with one voice. In the belated cases which came before the court in 1920, that of the *Philadelphia Tageblatt*, an insignificant anti-war paper published in the German language, and that of the *United States* vs. *Pierce*, involving a Socialist pamphlet written by St. John Tucker, the court attempted to solve a complex problem which has puzzled the ablest historians, namely, the cause of American entrance into the war. Justice McKenna, who in the fifteen years since his fine dissenting opinion in the Moyer-Pettibone kidnapping case had apparently forgotten that a government could ever be suspected of doing wrong, wrote the majority opinion against the *Tageblatt*, asserting that its statements

> were deliberate and willfully false, the purpose being to represent that the war was not demanded by the people but was the result of the machinations of executive power.

A decision of which Justice Brandeis said, concisely:

> To prosecute men for such publications reminds of the days when men were hanged for constructive treason.

In the Pierce case, Justice Pitney, who in *Coppage* vs. *Kansas* had made the startling discovery that there is such a thing as diversity of fortune, now was unable to find any place for diversity of opinion in the face of "common knowledge." The majority decision, written by him, states:

> Common knowledge (not to mention the President's Address to Congress of April 2, 1917, and the Joint Resolution of April 6 declaring war, which were introduced in evidence) would have sufficed to show at least that the statements as to the causes that led to the entry of the United States into the war against Germany were grossly false; and such common knowledge went to prove also that defendants knew they were untrue.

In all the subsequent peace-time issues that have come before it, the court has refused to budge from its first war-time position. Those who looked to it for any relief from the state sedition acts, looked in vain. The Fourteenth Amendment once so powerfully invoked against

the states to preserve the rights of laboring bakers is of no avail to preserve the rights of thinkers if they do not happen to agree with the majority. The prophecy of Justice Brandeis in the *Philadelphia Tageblatt* case has been abundantly fulfilled:

> In peace, too, men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past, to stamp as disloyal, opinions with which it disagrees.

Even the worst of such acts of an intolerant majority have been upheld by the Supreme Court. In *Gilbert* vs. *Minnesota*, dealing with the case of a Non-Partisan League speaker sentenced under the Minnesota Sedition Law for saying, long after the war, that the United States had been drawn into it "by newspaper rot to pull England's chestnuts out of the fire for her," the Supreme Court upheld the sentence and the statute, a statute described by Justice Brandeis as "an act to prevent teaching that the abolition of war is possible." In *Gitlow* vs. *New York*, dealing with Benjamin Gitlow, a former New York Socialist Assemblyman, sentenced to five to ten years in prison, under the revived statute against Anarchists passed twenty years before, although it penalized support of the "doctrine that organized government should be overthrown by force or violence" and Gitlow had advocated a general strike without reference to force or violence, the Supreme Court in 1925 decided that such minor divergences were of no importance and affirmed the conviction. No state has as yet passed a

sedition law absurd enough to be declared unconstitutional by the Supreme Court, nor found any utterance far enough removed from sedition for the Supreme Court not to recognize it as such.

The court, on May 27, 1929, reversed the decision of a lower court in order to deny American citizenship to Rosika Schwimmer of Illinois, a woman fifty years old, and, in the words of Justice Holmes, "of superior character and ability, obviously more than usually desirable as a citizen of the United States." Why did the Supreme Court deem it fitting to deny citizenship to such a person? On the ground of her refusal to bear arms, if called upon to do so in a hypothetical war. In such a war, she stated, she would be willing to act as a nurse and even expose herself to certain death to shield an American soldier, but she would not consent to kill anyone. This was not the type of Amazonian virago that the Supreme Court apparently favors as its ideal of American womanhood? By its decision it gave its approval to similar refusals of citizenship in other states—to a member of the Church of the Brethren in Washington, to a Quakeress in Oregon, to a Seventh Day Adventist in Wisconsin, to a Mennonite in Ohio, and to a professor in Yale Divinity School who, although not a pacifist, refused to bear arms in a hypothetical war in which he should not believe. No wonder that Justice Holmes wrote stingingly of the Supreme Court decision:

> I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I

had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount.

During the height of the "war hysteria" of 1917-18 the rights of actual pacifists were at least theoretically respected. But in the calm days of 1929 even potential pacifists—potential conscientious objectors—were condemned. Citizenship in the United States today can only be obtained, when not a birthright, by an explicit agreement to do what one believes to be morally wrong if a law commands it. That is the bald principle involved in the Supreme Court decision in the Rosika Schwimmer case. If this decision stands, and is supported by the American people, citizenship in such a nation will not continue to be valued highly by honest men. The law or the Supreme Court has gone a long way—a very long way—toward making American citizenship contemptible.

CHAPTER VI

Fair and Speedy Trials

The American theory of government means that back of the humblest citizen, supporting him in all his rights, organized for his protection, stands the whole force of the nation.

—Calvin Coolidge

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CHAPTER VI

Fair and Speedy Trials

I. Southern California Justice

One familiar with the America of twenty years ago is struck today by the absence of those picturesque street meetings formerly held in every city at some spot traditionally dedicated to political discussion. They died, of course, during the war, but for some time before they had been fighting a losing battle. It is the pride of San Diego, Cal., to have been the first city effectively to suppress them. The events constituting the "San Diego Free Speech Fight of 1912" were an epoch-making, or at least epoch-marking, point in American history.

On December 8, 1911, a petition signed by eighty-five persons, mostly merchants, was presented to the Common Council, requesting the prohibition of street speaking in "this, our city" within an area of seven blocks square, including the crossing of E and Fifth Streets, which for years had been used in the evenings as an open-air forum of the people. A counter-petition signed by 250 persons, presented on December 13th, was disregarded, and the prohibition was issued as an emergency

ordinance "for the immediate preservation of the public peace, health and safety," although none of these had been threatened. The ordinance aroused great indignation among the workingmen of the city, and no attempt was made to enforce it until February 8th, when forty-one men were arrested. A Free Speech League, formed to oppose the ordinance, nightly supplied new speakers until by the middle of March the jails were overcrowded. "Third degree" terrorization was adopted by the police, and one man of sixty-five, Michael Hoey, died as the result of fearful beatings.

Lawless deportation was the next step in the enforcement of the law. A "Citizens Committee" of vigilantes coöperated with the police in wholesale kidnapping of "undesirables," kidnapping usually accompanied by much brutality. The I. W. W.'s, here as everywhere, were the chief victims, but the outrages were by no means confined to them, but extended to others who joined the Free Speech League or openly expressed sympathy with it. The editor of the *San Diego Herald* which had printed too much of the truth, was seized in his own home, carried miles away, and threatened with death if he returned. Theodore Schroeder in his *Free Speech for Radicals* (1916) quotes the statement of a Russian residing at this time in San Diego:

> I lived for years under the despotism of the Tsars and witnessed the methods by which the officials of Russia suppressed any effort of the peasants to better their conditions . . . but in all the years I lived in Russia I never witnessed such inhuman treatment by

> the Russian police as that meted out to the members of the Free Speech League.

Comparison with Russia was also suggested in the official report of Commissioner Weinstock, sent by Governor Hiram Johnson to investigate the situation:

> Your commissioner has visited Russia. . . . It was hard for him not to believe that he still was sojourning in Russia, conducting his investigations there.

These Russian methods, however, were thoroughly approved by the public opinion of San Diego, at least so far as this was expressed by the Chamber of Commerce and the Merchants Association, both of which passed resolutions commending the actions of the "Citizens Committee."

The sort of action which the business men of San Diego commended, and in which some of them took part, will be shown with sufficient clearness by the details of a single case. Emma Goldman came to speak in the city on May 14th, but even the dauntless Emma deemed the time too unpropitious and hurriedly left town with her speech undelivered. Her manager, Dr. Ben Reitman, was less fortunate. Theodore Schroeder (*op. cit.*) tells the story of his mistreatment as follows:

> As he narrated his tale, he was taken by fourteen vigilantes, who looked to him like business men. When, at first, he refused to go with them, they clapped revolvers to his body and dragged him to an automobile, while the police—although they denied having anything to do with the affair—cleared

> the way for his abductors. On their way to the desert, about thirty miles from San Diego, his captors thrust pencils into his nostrils and ears, stuffed filth into his mouth and struck him with their fists and clubs. When they reached the desert there was another party waiting. In the light of the fire they stripped him, and then committed on him acts of such . . . indecency and torture that he claimed the details of them were unfit for publication. . . . Screaming from pain, he begged them to kill him and end it. But they refused, stating that they wanted him to go away and tell how they received advocates of free speech in San Diego. Then he was ordered to sing "The Star-spangled Banner", and at every false note he was struck in the face, being knocked down several times during the ordeal. . . . After a half-hour or so of this treatment, he was made to run the gauntlet, being beaten with "billies" as he ran. Then, while six men held him to the ground, another slowly traced the I. W. W. letters with a lighted cigar on his back. . . . At the end they smeared him with filth and then applied the tar, covering it with cactus and desert grass, and finally drove him into the desert.

Following the report of Commissioner Weinstock, Governor Johnson sent Attorney-General Webb to San Diego. The Attorney-General devoted himself to securing speedy trials of the violators of the repressive ordinance, most of whom had now been in jail for three months; a few were given light sentences, the rest were

released; the jails were once more relatively empty, justice had been vindicated, and the Attorney-General returned to Sacramento. The vigilantes, their work accomplished—since no one left in San Diego was in a mood to discuss free speech or anything else—went back to business. And the city of San Diego, purged of "undesirables," considered itself the most suitable of candidates for the national Exposition of 1915.

II. Northern California Justice

In San Francisco, on the afternoon of July 22, 1916, a bomb exploded in the midst of a crowd gathered to watch a Preparedness Day parade, killing or fatally wounding ten, and injuring forty more. One following the newspapers of the next four days can trace the change from a first natural assumption that the crime was the work of some fanatic—before the parade numerous fanatical letters threatening violence had been received by the police—to an acceptance of the state's theory that it was the work of some subversive group of Anarchists, Socialists, or what not. Thus the public was already prepared when on July 26 two prominent labor agitators, Warren Billings and Tom Mooney, were arrested, and on the following day Mrs. Mooney, a taxi-driver named Israel Weinberg, and Edward Nolan, president-elect of Machinists' Lodge No. 68. Some powder found in Nolan's basement and believed to be saltpeter was supposed to indicate the place where the bomb had been manufactured.

There were certain ominous circumstances about the

case even at the outset. The arrests were made without warrant, under the direction of a private detective, Martin Swanson, who had been for years employed by various California corporations—the United Railroads of San Francisco, the Pacific Telephone Company, the Pacific Gas and Electric Company, the San Joaquin Light and Power Company, the Western States Electric Company, and the Sierra and San Francisco Power Company. While the patriotic spirit of these corporations in lending their private detective to the government was, of course, admirable, it was, at best, unfortunate that this should be necessary. It was also unfortunate that it should be necessary for some time to hold the prisoners incommunicado, denying them access to counsel. When the supposed saltpeter found in Nolan's basement proved on analysis to be epsom salts, Nolan was not released. On the contrary, he, along with the others, was indicted by the Grand Jury on August 1st for the murder of the eight victims of the explosion who had died.

The trial of Billings, which was held in September, attracted less attention than it might otherwise have done because it was held during a spirited presidential campaign. Otherwise the amazing character of the proceedings could hardly have failed to arouse greater indignation. The theory of the prosecution was that the defendants had gathered at 721 Market Street, more than three-quarters of a mile away from the corner of Steuart and Market Streets where the explosion occurred, had there entered Weinberg's car and had driven down Market Street in the face of the parade to the scene of the crime, where Billings had planted the bomb, after which

they all made their escape. This preposterous theory, which ought to have been incredible to anyone who had ever seen an American parade, was rendered doubly preposterous by the admitted facts: all cars had been diverted from Market Street for an hour before the parade and there were traffic officers stationed up and down the avenue for the specific purpose of keeping the street clear, not one of whom had seen any such car as Weinberg's. The prosecution's argument involved the strange assumption that the entire traffic squad of San Francisco had been smitten with blindness and paralysis on that fateful afternoon. Of the seven major witnesses for the prosecution, one was shown to have been a felon; another was the wife of a forger then serving a penitentiary sentence; a third was a professional prostitute. Reputations of this sort, while almost sufficient in themselves to damn anyone accused of a crime, are often of great use to the state when hard pressed for witnesses. The woman wrote to her husband stating that the authorities had promised to release him in return for her evidence, and her daughter later confessed that she had been threatened if she refused to testify. Only two witnesses claimed to have seen Billings anywhere near the place of the crime, and of these one put him at Mission and Steuart, at the moment when the other had seen him at Market and Steuart. Thus the evidence against Billings boiled down to the single statement of the latter witness, who has since confessed that he lied. Billings was convicted but sentenced only to life imprisonment, at the request of Assistant District-Attorney James Brennan, who had none too great

confidence in the state's argument and later himself urged the pardon of both Billings and Mooney.

When Mooney was brought to trial in January, the prosecution had bolstered up its case. It had now secured a witness who seemed to stand out from the rest, Frank C. Oxman, an illiterate but apparently reputable Oregon cattleman, who testified to having seen the defendants arrive in their car at the corner of Market and Steuart. On the other side, however, was the testimony of a number of reputable witnesses who claimed to have seen Mooney and Mrs. Mooney on the roof of the Eilers Building, over a mile from Market and Steuart, both before and during the parade. This testimony was corroborated by photographs from the camera of a young man who had been taking snap-shots of the parade from the roof of the building; in these photographs there appeared not only Mooney and Mrs. Mooney, but a large jeweler's clock. The films had been in the hands of the prosecution since early in the Billings trial, but when they were demanded, only blurred enlargements had been produced from which it was impossible to determine the exact hour. The matter had then seemed less important since Billings did not appear in the pictures, but now, in the Mooney trial, a court order was obtained for the production of the films, contact prints were made by an expert, and the exact time could be read. The jeweler's clock announced that Mooney and Mrs. Mooney had been over a mile away from the scene of the crime at 2:04 P.M., one minute before the explosion. Faced with this new development, one witness employed by the prosecution found on reflection that he had seen Mooney

and Billings at Market and Steuart somewhat earlier than he had previously testified, leaving the way open for the argument that Mooney and his wife had hurried back to the Eilers Building in time to get themselves conveniently photographed. Despite the testimony of eight witnesses that Mooney and Mrs. Mooney had never left Mrs. Mooney's studio in the Eilers Building from 11:30 until they went on the roof at about 1:30, the state's new theory seemed so plausible to the jury that Mooney was condemned for murder in the first degree and duly sentenced to be hanged. He appealed to the Supreme Court for a new trial, and, while his appeal was under consideration, letters were discovered from Oxman to a friend urging him "to cum to San Frisco as a expurt wittness in a very important case," adding, encouragingly, "You will only hafto answer 3&4 questiones and I will Post you on them." The friend came, but objected to perjuring himself to the necessary extent, and on his return told the story to a lawyer. Oxman's letters were sent to Judge Franklin A. Griffin, the trial judge, who forwarded them to Attorney-General Webb, recommending a new trial, and the Attorney-General in turn forwarded them to the Supreme Court with the same recommendation. But the court held that it had no authority to consider matters which were "no part of the record sent to us from the court below." Oxman was tried for perjury and acquitted, the jury accepting his statement that there had been a lost page in the correspondence in which he had told the prospective witness not to come unless he had been in San Francisco at the time of the explosion. Later it was proved that Oxman

himself had not been in the city at that hour, but was ninety miles away in Woodland, buying stock from a California cattleman. The case against the rest of the Preparedness Day prisoners collapsed: Nolan, after being kept in jail for nine months, was dismissed; Mrs. Mooney was brought to trial and acquitted; Weinberg was tried and acquitted. But Billings and Mooney remained in prison.

Americans began to be mildly interested in the case when in the summer of 1917 there was a demonstration before the United States Embassy in Russia, then still a valued ally. President Wilson appointed a mediation committee to investigate, headed by Secretary of Labor Wilson and Felix Frankfurter, professor of law in Harvard University. On the report of the commission, President Wilson wrote to Governor Stephens of California asking that a delay of execution and a new trial be granted Mooney; as the day of execution approached without the Governor's taking any action, the President followed up his letter with two telegrams. Governor Stephens declined the suggestion of a new trial, but on November 28, 1918, commuted Mooney's sentence to imprisonment for life. At this time it was evident as it is today that there had been a gross miscarriage of justice, but, none the less, Mooney stayed in prison. A petition to Governor Richardson on October 22, 1926, supported by letters from Judge Griffin, nine out of the ten living jurors, police officials, and prosecuting attorneys—by nearly everyone connected with the case except District-Attorney Fickert—was nevertheless denied by the Governor for reasons best known to himself. A similar petition

was presented to Governor Young on December 13, 1926; on September 24, 1927, the Governor said, "I am impressed with the fact that whatever appeal may be made for Mooney is largely because of his prominence in former years as a rather militant dissenter from the established order of things, rather than for causes immediately connected with his trial"; on December 29, 1928, owing to the efforts of Frank P. Walsh, acting as a voluntary attorney for Mooney, the Governor at last consented to take the petition under advisement. After a year and a half of study, Mr. Young has not yet been able to make up his mind on the case. He has, however, expressed himself as deeply grieved by the suggestion of Fremont Older, editor of the *San Francisco Call*, that his delay might be owing to political pressure, so the charitably disposed, if they will, may judge him to be guilty of nothing worse than slow-wittedness. Mooney and eventually Billings will probably be "pardoned" if they live long enough. But who will pardon the District-Attorney? Who will pardon the series of apathetic Governors? Who will pardon the people of California, content to let this case drag on forever?

III. Washington Justice

"On Armistice Day, 1919, an American Legion parade in Centralia, Wash., while passing the I. W. W. hall, was wantonly fired upon by I. W. W. members, secreted in the hall and in a hotel across the street, and thus four of the nation's heroes were foully murdered." Such, in substance, was the tale told by the government, the tale

carried by most of the newspapers throughout the country, the tale which sent eight men to prison in Walla Walla, where they still are, ten years after the event.

What were the facts? First, a few which never reached the jury because Judge John M. Wilson, before whom the case was tried, held that they were immaterial and irrelevant. During 1917-19 there had been a series of successful lumber strikes in the Northwest which had admittedly inflamed the lumber-owners' minds. On April 30, 1918, during a Red Cross parade in Centralia, sponsored by the Employers Association of Washington, composed of lumber manufacturers, the I. W. W. hall had been demolished. This armed attack had not been resisted in any way by the I. W. W. members present. On June 13, 1919, in broad daylight, a blind newspaper agent selling labor papers was kidnapped on the main street of Centralia by well-known business men and forcibly deported. On June 27th there was formed an association of employers, called the "Citizens Protective League"—beautiful name—for the purpose of opposing organized labor, and on October 20th, at a meeting of this association, ways and means were discussed for getting rid of the loggers' unions in the neighborhood. The chief of police and the county prosecutor told the meeting that the I. W. W. were within the law and that legal steps could not be taken against them. In answer to suggestions of mobbing, Postmaster William Scales, presiding officer and local American Legion commander, said that he did not believe in mobbing, but was sure no jury would convict for it. Thereupon he is said to have been empowered to appoint a secret committee. Attorney Warren O.

Grimm, one of the murdered "heroes," attended this meeting. On November 4th, the I. W. W., after requesting police protection and being denied it, distributed circulars asserting that they were threatened with violence and appealing to the citizens' sense of fair play. These were the earlier irrelevant events; there was also one later fact deemed equally irrelevant by Judge John M. Wilson, namely, that on December 7th, before the trial opened but after it was known that he would preside, Judge John M. Wilson had delivered a speech eulogizing the dead ex-service men.

Further facts which it is more difficult to consider immaterial were these: the parade went out of its way to pass the I. W. W. hall, in front of which it was halted; certain members then broke from the ranks and rushed the hall; the door was broken in, they started to enter, and three of them were shot. A moment later an I. W. W., Wesley Everest, himself an ex-service man, dashed out of the hall and was pursued; before being overtaken he dropped a fourth man. Evidence later showed that the three earlier deaths had also been caused by bullets from his .45 Colt automatic. Everest having been taken to jail, some hours later a crowd of lynchers forced their way in, seized him and carried him to the outskirts of the town, where, after being emasculated, he was killed.

The I. W. W.'s who had been within the hall were tried for murder, one of them going insane during the trial; also another man, Eugene Barnett, who had been in the adjoining Roderick Hotel at the time of the parade, chatting with the proprietor, and who had seen the

entire proceedings—and who, therefore, threatening to be a dangerous witness, was conveniently moved by the prosecution across the street to the Avalon Hotel, given a Colt automatic identical with Everest's, and made to shoot Grimm, standing motionless at the head of his column—all this, although no one saw anybody at the Avalon windows or heard a shot from that direction! Fifty American Legion men were paid four dollars a day to come to court and stare menacingly at the jury. The court-house was surrounded by troops, sent by the Governor, although there had been no request for them from the sheriff. In this atmosphere, the jury, three of whom have since admitted that they were terrorized, returned a verdict of second degree murder against all the defendants, including the insane man, although they had earlier attempted to render a third degree verdict—rejected by the judge—for Eugene Barnett, the jury apparently believing him innocent, since, if guilty at all, he was, accepting the prosecution's theory, the most guilty of all. The jury also recommended leniency, a recommendation which Judge Wilson carried out by inflicting sentences of from twenty-five to forty years!

There is a monument in Centralia to those of her sons who were unfortunately caught by death in a cowardly and lawless act. There is no monument to Wesley Everest, brutally lynched for shooting in self-defense. Centralia may perhaps be pardoned if she looks upon her own civic virtue with a somewhat partial eye. But what of the citizens of the state of Washington who have permitted eight innocent men to lie in prison for ten years.

They do not know? Is it that they do not know or do not care?

IV. Massachusetts Justice

If you be my accuser,
Pray, cease to be my judge: come from the bench.
—John Webster, *The White Devil*

In the delirious days of 1920, among the 200,000 names in the filing-case of Attorney-General Palmer were those of Nicola Sacco and Bartolomeo Vanzetti. Both men were Italians of good family, Sacco's brother being mayor of his native town of Torre Maggiore and Vanzetti's father being a business man in comfortable circumstances in Piedmont. The younger men, however, held more liberal political views than those of their families, and, about twelve years before, misled by an old tradition, they had come to America, seeking a land of greater freedom. Since that time they had been hard-working, self-respecting laborers, never accused of the slightest crime. Sacco had become a highly skilled craftsman in the edge-trimming of shoes, earning, at one time, as much as $22.50 a day; devoted to wife and children, he had deposited each week some of his wages in the bank until they had already totalled $1,500, with which he was planning to take his family on a trip to Italy. His reputation for trustworthiness was such that Michael Kelly, owner of the Three K Factory in Stoughton, made him night watchman, in which capacity, incidentally, Sacco bought

a Colt automatic, later to be his undoing. Subsequently Mr. Kelly, who knew him well, was to say, with some apparent reason:

> A man who is in his garden at four o'clock in the morning, and at the factory at seven o'clock, and in his garden again after supper and until nine and ten at night, carrying water and raising vegetables beyond his own needs which he would bring to me to give to the poor, that man is not a "hold-up man."

Vanzetti, unmarried, and of a more individualistic type much like our American Henry Thoreau, after trying various factory jobs had settled down contentedly in Plymouth as a fish-peddler, an occupation which left him free to approach his ideal—"a little roof, a field, a few books and food." But, there having been many robberies in the neighborhood, he, too, unwisely, purchased a revolver. Unwisely, also, he stayed in America. Later he was to write to a friend:

> But my father has many fields, houses, garden. He deal in wine and fruits and granaries. He wrote to me many times to come back home, and be a business man. Well, this supposed murderer had answered to him that my conscience do not permit to me to be a business man and I will gain my bread by work his field.

What had Attorney-General Palmer, in his stone house in Washington, its façade now happily mended, to do with these simple laborers? Vanzetti's favorite authors

were St. Augustine, St. Francis, Dante, Tolstoi and Kropotkin. And Sacco's son was named "Dante"—an un-American name. But there were further grounds of objection to these two men. In 1916 Vanzetti had taken part in a successful strike in the Plymouth Cordage Works. And in 1917 both men had gone to Mexico to avoid being called upon to serve in a war in which they did not believe—and District-Attorney Katzmann's first question to Vanzetti in a trial which had nothing to do with the war was to be, "So you left Plymouth, Mr. Vanzetti, in May, 1917, to dodge the draft, did you?" They were members of the Italian Naturalization Club, which met weekly in East Boston to play bowls and discuss politics. After the January raids of 1920 there was, with good cause, much uneasiness among the Italian colonies in Massachusetts, not allayed when rumors of the treatment of Andrae Salsedo in New York reached them. Vanzetti went to New York to investigate, and on his return he and Sacco planned a mass meeting of protest and had handbills printed. Just at this time they were arrested, on May 5, 1920. So much for the reasons why the United States Department of Justice was interested in them.

There were also reasons why the local police of Massachusetts should be interested in anybody who could possibly be convicted of anything. A series of daring hold-ups had occurred, culminating on April 15th at South Braintree, where, in full daylight, Parmenter, paymaster of the Slater & Morrill Co., and his guard, Berardelli, were murdered by a gang of bandits who escaped in an

automobile with $15,000. The police in every case had failed to discover the criminals and public criticism was becoming hot.

When arrested, the two men, confused, ignorant of the crime wherewith they were charged—naturally since the police had not yet decided what it was to be—but governed by a well-grounded fear that their arrest would be the prelude to another Salsedo episode, took refuge in foolish lies as to their recent radical activities. Vanzetti was first brought to trial, before Judge Thayer, for an attempted hold-up which had occurred at Bridgewater on December 24th, when the L. Q. White pay-roll truck had been fired at by a man on the sidewalk. Of the three employees on the truck, one at the preliminary hearing described the would-be robber as "smooth-shaven," another as having a "short and croppy mustache," another as being "short and of slight build"; but, after seeing Vanzetti, they remembered at the trial that the bandit had a "bushy" mustache and was "about five feet, eight inches tall." A half-blind old woman testified that she thought Vanzetti was the foreigner she had seen in town that day, and a little schoolboy, who during the shooting had prudently hidden behind a tree 145 feet away, was sure Vanzetti was the bandit because "I could tell he was a foreigner by the way he ran." On the other hand, eighteen reliable witnesses, nine of them persons who had bought fish from him, testified to Vanzetti's being in Plymouth on that day. Unfortunately, many of these witnesses were Italians, and for that reason the jury preferred to believe the self-contradicting truckmen, the

old woman, and the schoolboy. Vanzetti was convicted and sentenced to from twelve to fifteen years in prison. His lawyer refused to allow him to take the stand, did not call the Plymouth captain of police, ready to testify to Vanzetti's good character, and failed to file any bill of exceptions.

Sacco, who could not be implicated in the Bridgewater affair because he had been at work on that day, had been kept in jail in readiness. Now with Vanzetti's reputation ruined by the result of the earlier trial, so that all subsequent character testimony in his behalf could be ruled out on the ground that he was already a condemned criminal, the more serious murder case proceeded.

No chance was missed openly or by innuendo to identify the prosecution's case with patriotism. The court-house was guarded by officers in khaki who protected the jurors from imaginary violence as carefully as if the jury were the very United States Government itself. Judge Thayer's charge to the jury began:

> Gentlemen of the Jury, the Commonwealth of Massachusetts called upon you to render a most important service. Although you knew that such service would be arduous, painful, and tiresome, yet you, like the true soldier, responded to that call in the spirit of supreme American loyalty. There is no better word in the English language than "loyalty." For he who is loyal to God, to country, to his state and to his fellowmen represents the highest and noblest type of true American citizenship.

Twenty-two pages of the printed trial record are devoted to an examination of Sacco's political opinions. Outside of the court-room Judge Thayer's expressions of prejudice were so indiscreet as to call down the subsequent condemnation even of Governor Fuller's advisory committee. A stool-pigeon was planted in the cell next to Sacco's; another was slipped into the Sacco-Vanzetti Defense Committee, with the privilege of appropriating money furnished for the defense; it was planned to send a third to board with Mrs. Sacco, since, owing to her "great physical, mental, and spiritual suffering . . . it should be easy . . . to establish friendly relations with her," but this last pigeon proved to be so lame a bird that he was soon dismissed.

The actual evidence submitted was the least part of the trial. Vanzetti's alibi that he spent the day in Plymouth was supported by eleven undiscredited witnesses. Five very much discredited and tangled witnesses thought they had seen him in or near South Braintree, but their identification was of the vaguest character. Sacco's alibi that he had been in Boston all that day arranging for a passport for his long-projected trip to Italy was supported by the clerk in the Italian consulate, by two journalists with whom he had lunched, by two other persons who had seen him, and, most important of all, by an utter stranger whom Sacco recognized at the trial as having been on his train from Boston to Stoughton on the night of April 15th, and who, on consulting his business books, which were put in evidence, found that he had in fact been on that identical train. Four witnesses in South

Braintree attempted positively to identify Sacco as a man whom they had seen in the bandit car when the latter passed. Of these, one, a bookkeeper of the robbed firm, must be credited with the keenest observational powers known to history. From a distance of eighty feet she had seen the car cover thirty feet—that is, at the rate it was going she had seen it for one and a half seconds; yet she was able to give the following description of one of its occupants:

> He was a man that I should say was slightly taller than I am. He weighed possibly from 140 to 145 pounds. He was a muscular,—he was an active looking man. I noticed particularly the left hand was a good sized hand . . . the face was what we would call clear-cut. . . . The forehead was high. The hair was brushed back and it was between, I should think, two inches and two and one-half inches in length and had dark eyebrows, but the complexion was a white, peculiar white that looked greenish.

Unfortunately, at the preliminary hearing she had sworn that she could not positively identify Sacco as the bandit; her later certainty, she said at the trial, was reached through "reflection." Another bookkeeper of the firm similarly changed her testimony from that given at the preliminary hearing. A third witness was forced to admit that he had told entirely different stories at different times. The fourth, whose testimony was contradicted by four other witnesses, had recently pleaded guilty to absconding with his employer's funds—a bit of evidence

that was prevented from reaching the jury by Judge Thayer on the ground that the witness had merely confessed and had not yet been condemned. A fifth witness identified Sacco as a man she had seen working under the bandit car earlier in the day; her testimony was flatly contradicted by another woman, who had been with her at the time. Twenty-two witnesses who had seen the bandits, one from a distance of ten feet, were certain that neither Sacco nor Vanzetti was among them.

The rest of the evidence, directed against Sacco alone, was purely circumstantial. It consisted of an unsuccessful attempt to prove that a cap, fallen near the scene of the crime, which didn't fit him, was nevertheless his, and a more important attempt to prove that one of the bullets found in Berardelli's body must have come from his pistol. Of the four experts who were called, one, Captain Charles Van Amburgh of the Remington Arms Works, testified: "I believe Number Three bullet was fired from a Colt barrel . . . I am inclined to believe that it was fired from this Colt automatic." The second, William H. Proctor, captain of the state police, used the curious phrase: "It is consistent with being fired by that pistol." The other two, James E. Burns, of the United States Cartridge Company, and James H. Fitzgerald, of the Colt Automatic Pistol Company, testified positively that the bullet could not have come from Sacco's weapon.

After the conviction and sentence execution was delayed for six years through the energetic efforts of William G. Thompson and Arthur D. Hill, who now entered the case as counsel for the defense. No less than seven

motions for a new trial were made; by the Massachusetts law, all had to come before the court of Judge Thayer, who declined to give way to another judge. The first motion was based on proof that the verdict was not in accordance with the evidence; the second on the confession of a leading witness for the prosecution, that he had lied under coercion by the district attorney; the third on additional proof of the criminal record of another leading witness; the fourth on the confession of another leading witness that she too had lied under coercion by the district attorney; the fifth on the confession of another leading witness, that he had told the district attorney that he was not sure of the fatal bullet's having come from Sacco's particular gun and so the ambiguous phrase, "consistent with," had been used in order to mislead the jury; the sixth on affidavits of two former Department of Justice agents showing illegal connivance of the federal government in a state case; the seventh on the confession of a murderer, whose case was still pending, that he had been a member of the gang which committed the Braintree murders and that Sacco and Vanzetti had no connection therewith. All these motions were denied. An appeal to the Supreme Court of Massachusetts for a new trial was denied on the ground that Judge Thayer had not exceeded his legal powers of discretion, and a final appeal to Governor Fuller resulted in the appointment of a special advisory committee which reiterated the denial without giving a single new reason. Meanwhile the miscarriage of justice had aroused more international excitement than any case since the Drey-

fus affair; in practically every civilized country of the world there had been widespread protests, expressed through popular mass meetings and utterances of individual leaders; but the parallel with the Dreyfus case, as in most of the parallels between contemporary American injustice and former instances, failed completely at the end. On August 22, 1927, after seven years' imprisonment, Sacco and Vanzetti were executed. Another black day—the blackest yet—had been added to the American calendar.

Mention of the names of Sacco and Vanzetti has been forbidden at public meetings in Boston. But their names will not be forgotten quite so easily as Boston mayors may suppose. The gallant and tender *Letters of Sacco and Vanzetti* (1928), edited by Marion Denman Frankfurter and Gardner Jackson, have been read by thousands and will be read by thousands more. There has as yet been no call for "The Letters of Judge Thayer." Perhaps a hundred years from now he will be dimly remembered as the obscure New England judge who gave an Italian fish peddler and an Italian factory worker the opportunity to be enrolled among the martyrs of history.

And America? It was an ill day for America when we turned deaf ears to the wise appeal of Anatole France:

> You are a great people. You ought to be a just people. There are crowds of intelligent men among you, men who think. . . . I say to them beware of making martyrs. That is the unforgivable crime that nothing can wipe out and that weighs on generation after generation.

Save Sacco and Vanzetti . . . for your honor, for the honor of your children, and for the generations yet unborn.

V. Pennsylvania Justice

In 1865 a law was passed in Pennsylvania permitting mine-owners to organize their own police, which, commissioned by the Governor, would act under state authority. Since the chief function of these forces was to suppress strikes, they were naturally recruited from those who could be counted upon to use strong-arm methods effectively. By 1905 the outrageous conduct of the Coal and Iron Police had become so notorious that it was proposed to replace them by a state constabulary. The latter was created, but then the reason for its creation was forgotten and the private police were not disbanded. The result was that the new state police were soon corrupted by the evil example of "the Cossacks"—as the corporation gangs are popularly called in Pennsylvania, and the miners were now terrorized by two organizations instead of one. Still, as the state police had other duties besides that of assisting the corporation police in time of strikes, and as many of them were men of fine character, the institution for a time enjoyed a reputation much above its deserts. Thus, commenting upon a resolution of the Merchants Association of New York to petition the legislature to establish a constabulary similar to that of Pennsylvania, the *World's Work*, February 1915, said:

It is probably true that such a constabulary could become an instrument of corruption as city police

> forces do, but it is significant that none of them has ever become so.

A significant comment upon the comment is furnished by the report of the legislative committee of the New York State Federation of Labor in 1924, appointed to investigate the constabulary seven years after it had become a reality:

> . . . their activities were so unlawful, brutal, obscene, and outrageous as to bring disgrace upon our state. . . . Their rowdyism, their brutality, their absolute disregard for law and order is borne out in detail in the voluminous affidavits of their victims and witnesses.

But the New York state police had never even distantly approached the record of their brethren in Pennsylvania. Several volumes would be needed even to report the instances of lawless violence committed by the latter or by the affiliated Coal and Iron men. Over a hundred detailed cases in the single strike year of 1922 are given in *Pennsylvania's Cossacks and the State Police* (1923) by John P. Guyer, a member of the investigating commission appointed by Governor Pinchot; these instances range from mere ordinary brutality, such as riding down men, women, and children at meetings or on the sidewalk, up to ingenious tortures in jail, the shooting up of tent colonies, and even murder. As a result of the report of this commission, Governor Pinchot cut the Coal and Iron forces in half, and during his enlightened adminis-

tration from 1923 to 1927 the mining districts enjoyed something like peace. Then the state fell back under the familiar corporation rule, and during the great soft-coal strike of 1927-28 the scenes of 1922 were reënacted. But finally an event occurred which was too shocking not to arouse indignation even in Pennsylvania.

On the evening of February 9, 1929, a miner, John Barkoski, quarreled with two Coal and Iron policemen. He was later delivered by them to the barracks at Imperial with a broken nose, five or six head wounds, and two fractured ribs. There, in the presence of the vainly protesting seventy-six-year-old company physician, a police official kicked and pounded his helpless victim, beat him with a strap, and twisted his broken nose, and then, after the doctor had left, according to another eyewitness, he stripped Barkoski to the waist and pounded him on the chest with a poker, while one of the others struck him over the head with knucklers. At six o'clock the next morning Barkoski was taken to the Sewickley Valley Hospital and examined by Dr. Herbert M. Fleming, whose report follows:

> He was in a very critical condition, pulseless and unconscious. His left lung was perforated, several ribs were fractured, and he had a possible skull fracture. He was covered with bruises and bleeding from numerous cuts. He was bleeding at the mouth, his eyes were glassy, there was a depression in his head, and the left side of his chest was crushed in. His left lung had evidently collapsed. He was suffering from extreme shock and was on the verge of death, with

heart action failing. There was also an injury to the abdomen, accompanied by paralysis of the intestinal tract.

After Barkoski's death, the two policemen and the official were indicted for murder, tried, and, on September 28, 1929, acquitted. The official probably has no subversive social theories; it seems hardly likely that he is a pacifist; he is the type of person that Governors of Pennsylvania delight to honor with police commissions.

Meanwhile, in response to public demand, a bill had been proposed by Representative Michael A. Musmanno, doing away with the private police entirely, but at the request of Governor John S. Fisher, former coal attorney, friend of Alexander Mitchell Palmer and Senator Grundy, this bill was dropped and another much less drastic measure substituted. Even this did not satisfy the corporations, so Senator W. D. Mansfield introduced a bill legalizing the powers which the mine guards already frequently exercised, of making arrests without warrant from a magistrate and of placing prisoners in their own private jails. Both bills were passed by the embarrassed legislature. Governor Fisher signed the Mansfield bill. Thus, after sixty-five years, the state of Pennsylvania is unable to get rid of one of the most barefaced and impudent pieces of class legislation ever passed. But the Governor would have us believe that under the new law the former evils will not recur, because now the name has been changed from "Coal and Iron Police" to "Industrial Police."

VI. North Carolina Justice

On the night of June 7, 1929, during a mill strike at Gastonia, N. C., Chief of Police Aderholt led a raid upon the union headquarters and tent colony that resulted in a gun fight in which he was killed. As usual, testimony as to which side fired first is conflicting. One member of the police force was drunk, or at any rate was later indicted for a drunken assault committed two hours before the raid. On the other hand, the union men had hitherto, even under extreme provocation, refrained from any violence, a fact attributed to the great influence among them of Fred Erwin Beal, a young Northerner who had come down to organize the union. But he, together with six others, was indicted for the murder of Aderholt. At the trial in September, Solicitor Carpenter introduced a model of the departed chief clad in his gory uniform; commanded by the judge to remove it, he was still permitted to pass the bloody garments around among the jury. One juryman suddenly went insane and the trial had to be postponed on September 9th. Angered at the delay, that night a mob kidnapped three union men and carried them off into the country, where they compelled two of them to give their comrade a severe flogging. With appetite for violence whetted, the same or a similar mob on September 14th first turned back a truck-load of strike sympathizers bound for a protest meeting in Bessemer City and then opened fire upon them, killing Mrs. Mary Wiggin, a poet much loved among the textile workers for her songs of labor.

On October 2nd the police once more took a hand in the game of lawlessness, a crowd of deputies under Sheriff Adkins shooting into a group of strikers, this time in Marion, N. C., and killing six of them.

After these victories of force came the victories of law. First, the flogging case: four men connected with the Loray and Myers mills were accused of the kidnapping; at the preliminary hearing in Charlotte the flogged union man was not permitted to testify, because he was an atheist; at the trial, the defense maintained that the union men had "kidnapped themselves"; the defendants were acquitted on October 19th. When the trial for the murder of Chief Aderholt was resumed, the testimony of the chief witness for the defense was impeached because she was a Communist, did not believe in a God who rewards or punishes, and had had a civil instead of ecclesiastical marriage ceremony. Despite these frightful facts, she had the temerity to say, "When I take an oath it has a binding effect upon me, and my conscience will cause me to tell the truth." Judge Barnhill felt that he could not say the same for himself: "If I believed that life ends with death and that there is no punishment after death, I would be less apt to tell the truth." His ruling was legally based on a statute of the year 1777. On October 21, 1929, the jury, eleven of whom were devout churchmen, returned a verdict of second degree murder against all the defendants; four were sentenced to twenty years in prison, one to fifteen years, and two to from five to seven years. Next came the case of the Wiggin murder; on the ground of "insufficient evidence" the grand jury on October 27th refused to indict any of

the nine men accused, since there were only thirty or forty witnesses against them. Finally, there was the Marion case: the eight deputy sheriffs testified that they shot in self-defense, although none of the strikers had fired and four of the six men killed had been shot in the back while running away; the deputies were all acquitted on December 21st.

North Carolina justice is swift and consistent. The *Gastonia Gazette*, October 22nd, seems to have summed it up admirably:

> It will not be safe for any so-called labor agitator to be caught nosing around here any time soon. The folks here are simply not going to put up with it.

But the answer appeared in a simple news item, carried in many papers a few days later, that the American Federation of Labor, as a result of the Gastonia troubles, had decided to unionize the South.

CHAPTER VII

From the Third to the Nth Degree

Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.
—*Eighth Amendment to the Constitution of the United States*

CHAPTER VII

From the Third to the Nth Degree

I. How We Have Improved on Prussia

Gentle reader, let us suppose, with your permission, that you are arrested for a major crime of which you are entirely innocent, and that accidentally you are at the moment unable to raise the bail of $1,000 or $5,000 required by the magistrate. Such things may happen. Strong in your belief that in America a man is considered innocent until he is proven guilty, you go confidently to jail. There your first surprise greets you when your fingerprints are taken—perhaps you had supposed that this was an indignity reserved for the guilty, not the innocent. A second surprise will be when you are herded in with a gang of thieves, forgers, and bootleggers to be eventually segregated with a smaller gang of alleged thieves, forgers, and bootleggers with whom you will have the innocent privilege of sharing the dirty blankets of a common cell instead of the punishment of occupying a private cell of your own. In other respects you may have difficulty in distinguishing between your treatment and that of those already condemned. You will rise at the same hour, you will eat the same meager prison

food—supposing that you are able to eat it—and you will be marched about, insulted, and bullyragged in the same manner by the keepers. Eventually your bail arrives and you are freed, perhaps having contracted some infectious disease during your stay, perhaps, if your arrest has been featured in the papers, to find yourself without a job. Have you been treated as if you were innocent or guilty?

This if you are fortunate and the police are not particularly interested in the case. If they are, you may not see the magistrate for days or be permitted to call any lawyer; you will spend the time in a private cell, indeed, but not alone; hour after hour you will be questioned by the police in an effort to extort a confession or information, and, if obdurate, you may very likely be subjected to much worse than mere questioning.

The method of the third degree, utterly alien to British or the older American tradition, was first developed in Prussia, but with "Yankee ingenuity" we have carried it far beyond anything that was ever known there. Its introduction in this country is commonly ascribed to Inspector Thomas F. Byrnes of New York City, about the year 1880. In the sketch of Byrnes in the *Dictionary of American Biography*, William B. Shaw writes:

> Byrnes brought about the conviction of many criminals—in some cases when the evidence of guilt was far from complete. . . . He acted on the theory that it is not remorse, but mental strain, that leads the hardened criminal to confess his misdeeds. The practice he adopted in procuring confessions involved far more than sheer brutality. Indeed, in many cases no

physical pain accompanied the process—not that Byrnes had any scruples against employing bodily torture, but he frequently thought other methods more effective.

With police inspectors of less imaginative powers than those of the redoubtable Byrnes, the "other methods" have become increasingly common. Of the present custom in the City of New York, Mr. Robert H. Elder, a former district attorney, writes as follows, in a letter which through the courtesy of Mr. Elder I am permitted to publish:

November 27, 1929.

DEAR MR. BATES:

Replying to your favor of November 24th, 1929, in which you put the question, "How far the 'third degree' is in common use in police investigations":

The third degree has now become established and recognized practice in the Police Department of the City of New York. Every police station in the city is equipped with the instruments to administer the torture incident to that process. The method, as practiced by the detectives in this city, is supported by their commanding officers as well as by the Police Commissioners of the City. The Police Commissioners do not say outright that they approve of the method, but they support it by their official conduct. The detectives know that their actions will be approved in administering the degree.

I know of one instance in which the punishment inflicted was so severe that a police surgeon was

called in, and stood by, and at intervals took the pulse of the prisoner and gave advice as to whether he could stand more beating. A necessary incident of the administration of the third degree is that detectives have to take the witness stand at times and commit perjury in order to justify confessions, *i.e.*, they have to deny that any threats or force was used to obtain statements from prisoners. This, however, does not interfere. The members of the Police Department consider that this is justifiable—not a great moral offense. Telling the truth is an optional matter with the Police. This moral degradation which is naturally incident to the third degree, is visited not only upon those who actually inflict the punishment on the prisoners, but upon the whole of the Police Department, for those who do not participate conceal or fail to reveal the truth when they find themselves in a position in which they must either tell the truth or lie.

Many tell us that we are suffering from a crime wave, and that the practice of the third degree is necessary in order to combat same. As a matter of fact, the practice preceded any indication of crime wave by many years. It has been a matter of slow growth. The crime wave, however, has developed various unexpected advocates of the third degree. One newspaper, for example, came out recently in an editorial in which it openly advocated the beating-up of prisoners whose first admissions or denials were not satisfactory to detectives. Our District Attorney, in a statement made to me and others, said

that he found no fault with that practice, beating up prisoners, so long as the detectives "beat up the right parties." Other newspapers here, within the last two years, have written editorials indicating clearly that their editors failed to see any moral or administrative fault in the method.

We have made complaints to Police Commissioners, Mayors and others, but have found no disposition to interfere with the practice. Juries, as a rule, pay little attention to testimony that a prisoner has been beaten up, unless the prisoner is a man whose record has been pretty clean. If he has lived a bad life, jurors around here seem to think it is all right to brutalize him. District attorneys, in addressing the juries on evidence of police brutality, argue like this (as one did in my hearing once), "Well, suppose the detectives gave him a few busts in the nose, and made him tell the truth?" They also argue, "Well, did he tell the truth?" Of course, the *petitio principii* in the argument, viz., that in many instances confession has to be accepted as the truth, before sufficient evidence remains to justify confession, is not apparent to the average jurors; and they won't listen to analytical argument which exposes the fallacy. They vote blindly for a good man (the prosecutor) against the bad man (defendant).

Yours truly,

Robert H. Elder.

RHE:GM

In the *Annual Report* to the New York Bar Association of its Committee on Criminal Courts, Law and Procedure, for 1927-28, similar charges are presented in the somewhat less emphatic manner befitting an Annual Report:

> We have made such study as we have been able of the foundation for assertions, now frequently made, that physical brutalities are constantly and systematically inflicted by arresting officers upon prisoners in their custody. These assertions appear almost daily in published accounts of criminal trials. . . . They are confined to no one state or section of the country, but appear common throughout the nation. . . . From the time of the enactment of the Code of Criminal Procedure in 1881 and the Penal Code in 1882, one or more of our members have at all times, with the exception of short periods aggregating some six years, been on the staff of the District Attorney of this country. We comprise in our membership three former United States Attorneys for the Southern District of New York and three former District Attorneys of New York county and from our aggregate experience and from such information as we have been able to acquire in our study of present conditions, we are of the opinion that many of these accusations are well founded.

It will be noted that the suggestion is made that similar conditions obtain the country over. Unfortunately,

there can be little doubt that this is the case. The following news dispatch from Helena, Ark., November 22, 1929, cannot be regarded as extraordinary, except perhaps in the attitude of the judge:

> A makeshift electric chair, said to have been in use in the Sheriff's office here for several years, today was ordered destroyed by Circuit Judge W. D. Davenport. . . . The chair was brought into the courtroom by order of Judge Davenport during the trial of a twenty-one-year-old negro.
>
> The Sheriff testified that the chair, inherited with the office from a long line of former county Sheriffs, had been rebuilt and used three times by him to obtain statements from prisoners.
>
> Judge Davenport described its use as "uncivilized" and added that "if these people are going to be mobbed before coming up here, there is no use of having a court."
>
> The young negro squirmed in the witness chair as he described the alleged torture to which he was subjected in the "electric chair." He said he confessed so the officers would turn off the current when the pain became unbearable. He then signed the confession, he said, "so they wouldn't put me in the chair again."

The attitude of the police is well illustrated by the action of one Board of Fire Police Commissioners when an Italian, arrested merely on the suspicion that he knew

about the killing of another Italian, was so badly beaten by the police in an effort to extort information that he died from the effects. The commissioners reduced the chief of police, chief of detectives, and seven other officials to the rank of patrolmen and suspended them for thirty days. It is no crime for a policeman to kill a citizen; still, if the matter becomes public, it may be necessary to demote him and suspend him for thirty days!

The more subtle forms of the third degree rarely do become public. In an excellent article entitled "Official Lawlessness" by Oswald Garrison Villard in *Harper's Magazine*, October, 1927, quotation is made from the confessions of a chief of police, covering the years 1922-26, which first appeared in the *Seattle Union-Record*. We find the chief telling of an electrically wired carpet stretched across the floor of the cell and how when the current is turned on "sparks fly and the prisoner leaps, screaming in agony, into the air. . . . It is not fatal, its effects are not lasting, and *it leaves no marks*." And the chief goes on to describe in more detail a further method "highly recommended by the police of other cities."

> The prisoner is given a heavy iron ball and told to place it in a slot in the end of his cell. This slot, they show him, is opened by a trigger from which depends a length of stout cord. The prisoner is then bound and thrown on the floor in such a manner that his head is under the slot. One of his legs then is lifted at right angles to his body and the release

> cord is tied to his foot. So long as he can keep the leg upright he is in no danger. While he is kept in this position, the prisoner is questioned, the police commenting at intervals on the agony he must be suffering in trying to hold the aching leg upright. Prisoners sometimes become unconscious through fear and pain. The "catch" of the plan is that, while he is being bound, a detective has removed the shot and has put in its place a rubber ball.

So, in every state, the torture goes on, brutal or refined, according to the amount of sadistic ingenuity possessed by the police authorities. At the moment when this page is being written, at every moment when it will be read, someone, somewhere in America, is suffering agony in a police chamber of horror. The practice is held not to contravene the article in the Constitution, and in many state constitutions, prohibiting "cruel and unusual punishments," because there is no "punishment" involved. The prisoner has not yet been convicted; how then can he be punished?

The common law which once governed American practice and which still governs that of England explicitly rejected confessions unless shown to proceed "from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause." At the mere hint of the use of third degree methods in Scotland Yard there was an investigation by the British Parliament. Is it well to lag five centuries behind our British cousins? Is it pleasant to listen to the justified sneer of the Canadian *Toronto Mail*?

The "third degree" is no part of the British system of justice. . . . It is always to be condemned as an *alien* weapon whose use will never be tolerated in Canada.

CHAPTER VIII

Intoxicated Temperance

The moral evil resulting from prohibition is incontestable. The discredit which it brings upon the churches is serious; the taste for disobeying the law which it engenders in the younger generation is baneful; and most of all perhaps, the policy of transforming the state into a tribunal of customs, moral virtues, and individual preferences is contrary to all the demands of modern man. In this respect American democracy has pushed its tendencies to a point where it joins with Russian Communism.

—Bernard Fay. *The American Experiment* (1929).

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CHAPTER VIII

Intoxicated Temperance

I. The Prohi War

John Adams, in his old age, looking back over the past, selected a definite incident as marking the beginning of American liberty. It had occurred in 1761. "American independence," said Adams, "was then and there born. . . . The seeds of patriots and heroes were then and there sown." What was this incident which Adams deemed so significant? It was the protest of James Otis against the use of general search warrants for smuggled liquor. Such general warrants Otis declared to be "the worst instrument of arbitrary power."

Otis, however, was wrong. There is a still worse instrument—a gun in the hands of a policeman bent upon search without any warrant at all. So general has this custom of illegal search become today—a century and a half after Adams and Otis—that Professor Forrest Revere Black could write in "The Curse of the Carroll Case," *Minute Man*, January 22, 1929:

> Recent news dispatches convey the startling information that as many as a hundred automobiles have

been stopped on a single afternoon on one road and the prohibition officers did not possess even the semblance of a blanket warrant. In Georgia, in order to stop cars, heavy planks bearing huge spikes were placed across the roads. Funeral processions have been molested and coffins searched without a warrant.

In these cases, however, there was at least no gun-fire. But prohibition officers are notoriously unsteady on their feet. According even to the government reports they seem as prone to stumbling as men afflicted with locomotor ataxia. And when the prohibition officer stumbles his gun invariably goes off and hits somebody. Or, when he isn't stumbling, he is indulging in target practice by shooting at tires and killing the owner. In the appalling list of prohibition murders recently published by the Association Against the Prohibition Amendment in its pamphlet "Reforming America with a Shotgun"—a list based so far as possible on official records—one reads in monotonous iteration the parrot-like apologia of the officials:

Warner slipped in the mud and fell, his pistol being discharged by accident.

Cheatham fell down the step. His pistol struck the door and was discharged.

Coffey's foot slipped, causing the gun to swerve.

Stevens stumbled and accidentally fired his rifle.

Gordon's rifle was discharged when he stumbled.

Bailey stumbled and his gun shot a high-school boy.

Kendrick, a sixteen year old student of Emory and Henry College, was killed by a deputy sheriff shooting at the tires.

Davis was killed by a policeman shooting at the tires.

Monroe was killed by a tire-shooting state prohibition officer.

Virkula was killed in the course of a fusillade of twenty shots fired by a border agent hoping to flatten the tires.

But there are plenty of other cases in the list where there was no "accident," save that the person shot happened to be innocent. I shall mention only two of the most striking. Jacob Hanson, a reputable citizen of Niagara Falls, was driving home on the night of May 5, 1928, when he was ordered to stop by a non-uniformed coast guardsman. Naturally mistaking him for a highwayman, Hanson speeded up his car; the coast guardsman opened fire and another stationed further along the road followed suit; a shot from the latter came through the windshield, gouged out Hanson's right eye, and lodged in the back of his skull. The unfortunate man died, later, after four months of protracted agony.

What happened to his assassin, queries some innocent reader? His assassin was saved from a state trial by the intervention of the United States District Attorney, and was afterwards tried in a federal court. One man on the jury stood firm for acquittal against the other eleven. Thus the accused escaped conviction, and, for aught I

know to the contrary, may be still shooting other men tonight.

The second instance is that of Miss Betty Heywood, who was driving home with her father and friends near Lorain, Ohio, on the night of September 26, 1928. They were summoned to stop by three men belonging to the special liquor squad of Lorain appointed by the mayor. Suspecting a hold-up, the automobilist drove on, until one of the squad fired several shots, one of which struck Miss Heywood in the neck and pierced her skull. But in this case justice was meted out to the offender. Even though Miss Heywood did not die, he was brought to trial before Judge Webber, a prominent member of the Anti-Saloon League, and fined five dollars and costs.

In the great majority of such instances, however, the guilty party is never even brought to trial. If he is a federal officer he is almost certain to escape conviction, even if tried, because it is the policy of the Prohibition Bureau to transfer such cases at once from the state to the federal courts, where the accused are usually defended by influential United States attorneys. The government first permits its citizens to be killed and then exonerates the killers.

The prohibitionists will never understand the intense popular indignation against them until they realize that non-drinkers as well as drinkers are indignant. One may grant the theoretical right of the government to proscribe the use of liquor and yet hold that the attempt to enforce this proscription now involves tyrannical and intolerable measures. I need never care to touch a drop of liquor and still object to the indignities of unwarranted

search. I may believe in total abstinence and still resent being held up by strangers on the highway with the danger of being shot if I proceed. Such violations of civil liberty are, of course, nothing new in America. Strikers and labor agitators have long been subject to them. But with prohibition they have suddenly affected a much wider class of people, so wide, in fact, that no one is absolutely safe. The indifference of prohibition officers to the value of human life has inevitably raised a larger question. May it not have taken its rise from the indifference of prohibition legislators to human liberty? The asking of this question by an ever-increasing number of people is the most encouraging sound heard in America in many a day.

II. The Prohi Temperament

Let us suppose a man to take a glass of liquor. He may find it pleasant and take another. He may even take a third. He may, in fact, go on until he becomes thoroughly and disgustingly drunk. He may then, while in that condition, return home, quarrel with his wife, and murder her. Obviously, then, argues the prohibitionist, the only way to save this drunkard's spouse from her melancholy fate is to penalize that first glass. Similarly, a man may smoke a cigarette and another and another; he may, in fact, smoke a whole package; he may go on and on until he smokes twenty or forty packages a day. He ruins his health and his disposition; he loses his job; his family starves. Let us save that piteous starving family by putting out the first cigarette. It is not an accident

that of the states which have anti-cigarette laws, four—North and South Dakota, Kansas, and Arkansas—were also early standard-bearers of prohibition. The spirit of that man of San Francisco, who was accused by his wife of becoming so angry over her smoking that he threw her on the floor, sat on her, and compelled her to eat a package of cigarettes one by one is singularly reminiscent of the prohibition spirit. One recalls the applause in the House of Representatives over the news that a young bootlegger had been shot by a prohibition officer in Washington. (He did not happen to be the regular House bootlegger.)

But why stop with cigarettes? The great city of Macpherson, Kansas—still in the prohibition belt—was strictly consistent in forbidding small boys to play marbles, lest they acquire a taste for gambling. Gambling, like drinking and smoking, may certainly become a habit. So, too, the Art and Literature Club of Kansas City was consistent in vigorously protesting against displays of women's underwear in shop windows. Think of the small boys and old men whose morals might not be proof against such allurements! So, too, were consistent the indignant Louisianians, back in 1925, who flogged a man for allowing his fifteen-year-old daughter to ride a bicycle in bloomers. Who knows how many fine young Southern gentlemen might have been ruined by the damsel's bloomers?

All of these activities have in common the characteristic that they are intrusions into the sphere of what has hitherto been considered private morals. They assume that the individual citizen cannot be trusted to use his

judgment in restraining his own fondness for liquor or cigarettes, his son's delight in marbles, or his daughter's penchant for bloomers. They assume in a word that every citizen is a fool in regard to conducting his own private life. But they also assume that this citizen is a very wise man in regard to how other people should conduct their private lives. He can track unerringly an apparently innocent act on to its dire consequences in the remote future. Strange, is it not, that the fool should also be so wise?

The fight for freedom in America today everywhere centers about tendency legislation. Prohibition is merely a crucial instance which has brought the matter into the foreground. No one, so far as I know, has ever objected in the name of liberty, to arrests for intoxication. Here there is an actual fact with which the law is fitted to deal. No one, so far as I know, has ever considered intoxication an excuse for crimes committed in that condition. Here again the law can take care of the case. But prohibition is not interested in crime or intoxication, otherwise it could not boast so loudly of its achievements. Its proudest moment is when Senator Brookhart recalls that President Loomis of the Lehigh Valley Railroad, at a banquet which they attended in common three years before, drank a glass of something which to the Senator's sensitive nose smelled like "liquor." A Washington attorney has drawn up the kind of complaint that could be filed in such a case:

> Whereas, one Smith Wildman Brookhart, a Senator of the United States from the State of Iowa,

deposes and on his oath says that on a certain occasion in the year of our Lord nineteen hundred and twenty-six he did in company with divers other persons, among them one E. E. Loomis, citizen of New York and president of the Lehigh Valley Railroad, attend a dinner, supper, repast, banquet, or party, given in the said Willard Hotel by one Walter E. Fahy.

Furthermore witness, the said United States Senator Smith Wildman Brookhart, deposes that while seated at a table in the Hotel Willard on the occasion of said dinner, supper, repast, banquet, or party, he did see, observe, detect and witness said E. E. Loomis, president of the Lehigh Valley Railroad, pour into a glass, tumbler, cup, vase, urn or other receptacle a certain liquid concoction, and that then and there in the presence, view, and in close contact with said complaining witness, the said United States Senator Smith Wildman Brookhart, the said E. E. Loomis did swallow, drink, sip or otherwise internally dispose of said liquid concoction.

Furthermore, said United States Senator Smith Wildman Brookhart, having at a time previous to said dinner, supper, repast or party had experience in the field of chemistry or other allied science, did become acquainted, informed and instructed in the matter of the smell, odor, aroma, whiff or sniff of drinks, cocktails, highballs, gin fizzes, gin rickies, Sazarac cocktails, New Orleans fizzes, ryes, Scotch, brandies, wines, ciders and other liquids of known and established alcoholic content.

> Therefore, because of this knowledge, information, instruction, said United States Senator Smith Wildman Brookhart did smell, whiff or sniff whatever it was said E. E. Loomis then and there did swallow, drink, sip or otherwise dispose of internally, and he, the said United States Senator Smith Wildman Brookhart, deposes the odor, aroma, whiff or sniff of said drink was that of something liquid in which there was a considerable alcoholic content.

Gentlemen might not approve Senator Brookhart's action, but the Board of Temperance, Prohibition, and Public Morals of the Methodist Episcopal Church gravely declares it "highly commendable" and hopes that it will be widely imitated. This board with the magnificent name, which would like to convert the whole nation into a body of snoopers spying on one another, is, of course, affiliated with the American Anti-Saloon League. In connection with the Brookhart incident, it stigmatizes Mr. Loomis's depraved deed as "a challenge to the sovereignty of the American people." How many such challenges does the board suppose the poor American people to receive every night of its life? And just what proportion of the American people is engaged in giving challenges and what proportion in receiving them? Or has the board confused itself, perchance, with the American people?

III. The Great Anti-Saloon League

The history of prohibition is the history of the degeneration of a moral reform into a mere struggle for

power. Prohibition—difficult though it may be to believe —actually began as a relatively sane "temperance" movement. During the first quarter of the nineteenth century a few fairly important societies were formed in America whose members pledged themselves to moderation in the use of spirits. By 1826 the original meaning of the word "temperance" was so far forgotten that the "American Temperance Union" could be formed, with members now pledging themselves to total abstinence from spirits. The notion that moral strength is to be gained by flight from temptation was already abroad in the land. By 1840 the movement had extended, in the formation of the "Washington Society," to include beer, wine, and cider. Even so early, the reformers had evidently begun to lose their sense of humor and their power of discrimination. Nevertheless, in the first half-century of our national existence there was no such thing as legal prohibition. There was a tendency in the churches to misuse the pledge by imposing it on children, but with this exception the opponents of liquor confined themselves to justifiable moral suasion. They were usually zealots; but they still recognized the right of personal liberty. They sought to convert, not to constrain; their appeal was to the conscience, not to the law.

Some time before the Civil War, Maine took the fatal step from temperance to prohibition, to be followed intermittently during the next fifty years by a few other states. The reformers were now definitely looking to the law, but both the national prohibition party and the W. C. T. U. were much too doctrinaire to be very influential. With the slow growth of culture, drinking to

excess was on the decline, and, had there been no interference with the process, the United States might in time have attained the civilized condition of England or France. But in 1893 a new organization, with a more sinister methodology, was formed, the Anti-Saloon League of Ohio, outgrowth of the rather harmless twenty-year-old Oberlin Temperance Alliance. Under the aggressive leadership of a Berea clergyman, the Rev. H. H. Russell, the new group soon attracted attention; similar organizations were formed in other states; and in 1895 the movement took on a national scope.

The Anti-Saloon League introduced a new policy into the prohibition movement. It aimed to utilize the Protestant churches to build up a political machine. With church members definitely enrolled in its ranks as voters, it approached the political candidate in district, county, or state, and demanded his views on the prohibition question. To the one whose record and replies were most satisfactory it then delivered the votes. This was done regardless of the candidate's record on all other issues, regardless of his fitness for office, regardless even of his own personal habits in the use of liquor. If he would only vote to compel others not to drink, he might drink as much as he pleased himself, for all the Anti-Saloon League cared.

Supported partly by the genuine hostility of a large share of the public toward the saloon, but chiefly by the powerful political machine which it built up, by 1917 the League was able to picture in its famous charts the whole country a chaste white aside from a few black regions of vice extending inland from the intellectual and cul-

tural centers—New York, Philadelphia, Chicago, San Francisco, and New Orleans. If the League had now devoted itself to consolidating its successes it might possibly have maintained the positions it had gained. But in its eyes there was one fatal defect in all the legislation that had been passed: it might be overturned if men later changed their minds. If a constitutional amendment could be put over, however, making prohibition a part of the fundamental law of the land, it would not matter whether men changed their minds or not. The League could always count upon a sufficient minority to block the repeal of the amendment; it would therefore remain permanently in legal control of the situation.

With the political power which it now had, the League would quite possibly, in any case, have succeeded in its purpose, but the war made its task immeasurably easier. While the ratification of the Eighteenth Amendment was under discussion its most powerful organized enemies, the German-American Alliance and the United States Brewers' Association, came under governmental investigation for disloyalty, both investigations being secretly started by Wayne B. Wheeler, attorney of the Anti-Saloon League, whose resolutions were introduced into Congress by Senator William King and Senator Wesley Jones. Once the opposition to prohibition was identified with pro-Germanism, the end was certain. As Wheeler wrote jubilantly to a colleague: "You have doubtless seen the way the newspapers have taken up the German-American Alliance. They are giving it almost as much attention as the Acts of Congress itself. We could not have

bought for $50,000 what we have gotten on this investigation." And he added, significantly, "We are not willing it be known at present that we started the investigation." It was not known. The Eighteenth Amendment went hurtling through the country on the shoulders of patriotism. Psychologically, if not literally, it was a war measure. As some one has said, prohibition was a war bride, married in haste to be repented at leisure.

IV. The Wheels of Wheelerism

The amendment once adopted, the next event of importance was the drawing up of the Enforcement Act. Again Wayne B. Wheeler did the work. Congressmen had become accustomed to being a rubber stamp for the Anti-Saloon League. Thus Congressman Andrew J. Volstead of Minnesota, who introduced the so-called "Volstead Act," has been visited in the public mind with misdirected opprobrium. The voice was Volstead's, but the brain was Wheeler's. Justin Steuart, Wheeler's publicity secretary, writes in his *Wayne Wheeler, Dry Boss* (1928):

> Wheeler frequently asserted that he took the suggestions offered by the League's special committee, combined them with his own rough draft, and produced the bill which, when some minor changes were made, became the Volstead Act. . . . To save Volstead's feelings, Wheeler later modified his statements and did not claim to have done more than to gather together material for the Judiciary Committee's use.

The atmosphere of intellectual dishonesty surrounding the whole program of the Anti-Saloon League became palpable in the wording of the Wheeler-Volstead Act. It was, to say the least, unfortunate that Congress should begin its prohibition legislation with a lie. To state that any beverage which contains more than one half of one per cent of alcohol is intoxicating, this is either a lie or is meant to apply only to infants—and the legislation was not, at least avowedly, either for or by infants. Arbitrary definitions are, of course, frequent in scientific hypotheses; the scientist says, "We will let X = P and see what happens." But a law is not an hypothesis. To define murder as a blow with the fist, grand larceny as the stealing of a match, or adultery as the exchange of a kiss would be neither wise nor honest legislation. Yet this is exactly the sort of legislation which Wheeler wrote into the United States statutes.

Success had at last turned the League's head. Its leaders had become thoroughly intoxicated, and Wheeler was the drunkest of all. He added provision after provision uncontemplated by the amendment and utterly unenforceable. The amendment prohibited the manufacture, transportation, and sale of intoxicating liquors for beverage purposes; the Wheeler-Volstead Act attempted to prohibit its personal manufacture for personal use; it attempted to prohibit a person from giving away liquor to his friends; it declared the mere possession of liquor to be *prima facie* evidence that a man intended to sell it or give it away; finally, in flagrant contradiction to the accepted principles of penal law, it declared that all its

provisions should be liberally construed. It was legislation gone mad.

In the general uncertainty as to just what the Act meant or how it should be applied, Wheeler, as its real author, became the unofficial adviser of the Treasury and Justice Departments. He also supplied written arguments for embarrassed Congressmen to present to their home constituencies.

> I have had to keep in close touch with the Congressmen during these primary campaigns [he wrote]. For a time there seemed to be a complete stampede among the Congressmen for a beer and wine amendment. I prepared arguments on this proposition for the Congressmen and have sent them out for distribution in the states. Congressmen are dependent upon us today to defend their position from a legal standpoint as never before. In many places they admit that they cannot defend their position on a ground that a liquor containing one-half of one per cent of alcohol is intoxicating in fact.

But the League stood ready to supply all needed sophistries.

Two more quotations from Wheeler, during the elections of 1920, have their interest:

> The fight for United States Senator Lenroot in Wisconsin, was a fine demonstration of League strategy. The wets had the majority of the votes, but were outgeneralled.

In Minnesota, Congressman Volstead was defeated in the primary, but the League contested the nomination in the courts, where it was thrown out on grounds of violation of the Corrupt Practices Act; it was then an easy task to persuade the congressional committee to name Volstead to fill the vacancy.

> Both Mr. Volstead and our friends in the district realize that, had it not been for the League's activity and support from the very inception of this fight, Mr. Volstead would have been defeated.

Speaking of the Corrupt Practices Act, what of the League? The Act requires the filing of a detailed statement of receipts of over a hundred dollars by "all committees, associations, or organizations which shall in two or more states influence the result, or attempt to influence the result, of an election at which Representatives in Congress are to be elected." With a strange reluctance, in such a moral organization, to reveal the sources of its income, the League had never filed any such returns. When its attention was called to the matter in 1920 it protested, claiming that its activities were "educational, scientific, and charitable rather than political, as intended by law." Did anyone suppose that it had ever tried to influence an election? What a complete misunderstanding! How could an innocent educational, scientific and charitable society be so completely misinterpreted!

Still speaking of corrupt practices, the administration of President Harding coincided with the high point of the League's success. Coming from Ohio, Wheeler's native state where his political influence was particularly strong,

the new incumbent was ready to give the Anti-Saloon leader anything he wanted. Among the many candidates for the office of Prohibition Commissioner, Wheeler simply selected the one that suited him, and on his appointment wrote Harding to thank him for his "coöperation," taking occasion also to issue a discreet warning as to the President's personal habits by copying out a scandalous article from the *Auto-Piano Weekly*, "in order that you may know what kind of information is going out from some of the correspondents." The numerous letters between Harding and "My dear Wheeler," given in Steuart's book, are not unamusing. They show Wheeler eager and aggressive, Harding mildly enthusiastic over the tale of dry victories but definitely responsive to news of Republican success. At last in 1923 Wheeler decided to crown his career with a master stroke—nothing less than to induce the President of the United States to obey the law. He called upon Harding and demanded that the latter take a total abstinence pledge. The President pleaded with him like a schoolboy, urging that his health might be injured by the abandonment of a life-long habit, but Wheeler was obdurate. He threatened to withdraw the support of the League, and the President capitulated. Like the other great latter-day American moralist, Anthony Comstock, Wheeler was either blind or indifferent to political corruption in his associates so long as they supported the particular reform in which he was interested. A close friend of Harry M. Daugherty, he wrote to him on December 21, 1922: "Nineteen twenty-two will always be remembered by yourself and your friends as one of your most eventful and successful years. I have

always had implicit faith in you and I felt sure that the attacks upon you would prove groundless." There is no record of what either may have written to the other in 1924, but it could hardly have been in the nature of congratulations on a successful year!

While in the election of 1924 the prohibition majority in Congress was larger than ever, the fatuousness of the whole movement was already beginning to be clear. The attempt to enforce the Wheeler-Volstead Act had led in the first instance to an era of home brew when everybody was busy concocting strange liquors from dandelions, figs, and thistles—liquors unpalatable, indeed, but sufficiently intoxicating. This depressing period, however, had now passed. Commercial liquor had come back in large enough quantities to quench the thirst of anyone who was willing to pay for it. Bootleggers and rum-runners, although they had not yet become millionaires (it was still to be five years before Mrs. Mabel Willebrandt should tell of discovering a bootlegger who owed the government an income tax of $1,300,000), had nevertheless become far wealthier than ordinary citizens and were definitely and powerfully organized. In the face of what was common knowledge, Wheeler continued to talk about the "great moral victory" that had been won, to oppose all modifications of the Wheeler-Volstead Act, and to demand severer and severer penalties. The tide at last began to turn against this most notorious of the League bosses. He never enjoyed the personal influence with the Coolidge administration which he had had under Harding; Congress began to grow restive under his long-continued domination, and his own friends per-

mitted him to be severely grueled by Senator James Reed in the investigating committee of 1926; worst of all, dissension began to appear in the councils of the League, and in 1927 he was publicly reprimanded for certain tactless utterances by the chairmen of the League's executive and legislative committees. His death on September 5, 1927, came none too soon to save him from personal defeat.

The extremist policies of Wheelerism, however, were too congenial to the spirit of the League to be abandoned. It has continued to insist upon ever more drastic legislation culminating in the Jones Act of 1929, which, following the example of the Michigan prohibition law, makes violation of the liquor statutes a felony. In states like Michigan, which also had the Baumes law, making mandatory life imprisonment for a fourth conviction of felony, a person might be sent to prison for life for manufacturing a pint of home-brew or letting a keg of cider stand too long in his cellar. In Michigan three violators of the liquor law were actually so sentenced, including a woman, mother of ten children. Little remains save to make possession of liquor a capital offense. There is no reason to believe that the prohibition leaders would shrink even from that, if they thought by such means to preserve their power.

And yet, after all its thirty-five years of effort, after all its cruelty and dishonesty, what has the Anti-Saloon League accomplished? One may readily list its achievements:

First, the substitution of the lawless bootlegger for the lawful saloon-keeper.

Second, the corruption of vast numbers of government officials.

Third, a great increase in actual drunkenness as compared with moderate drinking.

In the single city of Philadelphia an investigation in 1928 showed that a ring of bootleggers acting under assumed names had handled accounts of $10,000,000 in one bank. A fair share of this money had gone into regular monthly salaries to the police. That these salaries were reasonably large was shown in the cases of the three inspectors who were indicted along with eighteen captains. The official salaries of inspectors range from $3,000 to $4,000. The three gentlemen in Philadelphia had bank accounts, respectively, of over $40,000, $102,000, and $193,000. In Pittsburgh an investigation in the same year by the Allegheny County Grand Jury revealed a similar state of corruption, with officially recognized bootleggers who controlled the sale of liquor in their respective districts. In Detroit a more recent investigation of the Federal Grand Jury indicates that the yearly graft of border control officials amounts to $2,000,000. In addition to an established graft rate on every case of beer and whiskey, inspectors receive extra sums for "free nights on the river" when smugglers can bring in as much as they please.

The prosperity of the bootlegger is, of course, sufficient evidence of the enormous amount of drinking that goes on. Arrests for drunkenness in the period from 1920 to 1927 increased by over 125 per cent. If these figures should be discounted somewhat on the score of increased police activity or increased necessity of mentioning intoxication

when it is the cause of arrest, such reservations surely would not account for the entire increase. Nor would they affect the number of deaths from alcoholism which increased during the same period exactly 300 per cent. But why go on to labor points which every honest man admits? There will probably not be a single reader of these words who could not supply additional proofs from his personal knowledge.

"Well," one may ask, "who cares? The alliance of prohibitionist and bootlegger is necessary to the life of each. If drinking ever really disappeared—good-by bootlegger, good-by prohibitionist! They stand or fall together. Why not let the prohibitionist be happy in writing out his absurd laws which nobody obeys? Why not let the police officer be happy in his extra salary? Why not let the bootlegger be happy in his well-earned income? Why not be happy yourself and guzzle to the extent of your desire? Why worry?"

Certainly the prohibitionist, the police officer, the bootlegger, and the drunkard will not worry. Nor will the citizen whose transient interest ceases when his transient thirst is gratified. But there are still some old-fashioned lovers of reason who object to putting their lives and liberties in alien hands, who object to seeing their nation the laughing-stock of the world, who object to letting the United States remain forever the prey of crooks and hypocrites. How many such lovers of reason are left, only the future can tell.

CHAPTER IX

Major Minorities and Minor Majorities

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.

—Alexander Hamilton

CHAPTER IX

Major Minorities and Minor Majorities

I. Pressure Groups and the Constitution

The founders of the Republic were well aware of the dangers of what is usually called "the tyranny of the majority," and it was in part to meet this peril that a number of the most fundamental provisions of the United States Constitution were made. In his *Defence of the Constitution of Government of the United States of America,* John Adams wrote:

> We may appeal to every page of history we have hitherto turned over, for proofs irrefragable, that the people, when they have been unchecked, have been as unjust, tyrannical, brutal, barbarous and cruel as any king or senate possessed of uncontrollable power. The majority has eternally and without one exception usurped over the rights of the minority.

And Alexander Hamilton put the same thought more tersely—"The people, sir, is a great beast."

But these words, "majority," "minority," and "the people," need analysis. With due respect for Hamilton's forceful phrase, the people is not a great beast, nor yet,

on the other hand, is its voice the voice of God, for the very good reason that the people, as a separate entity, does not exist, and, since it does not exist, it has no voice. Persons, only, exist, and if 51 per cent of the persons in a given locality agree on a certain measure, we are in the habit of saying, by a misleading figure of speech, that the measure expresses "the will of the people," thereby mentally annihilating the 49 per cent whose "will" may be strongly opposed to it. This is not the place for a discussion of the ideal of proportional representation, as that rational development of democracy seems still far off. But it should be sufficiently evident that as a matter of fact we are dealing, not with "the people," but with majorities and minorities and minorities within majorities and majorities within minorities to a degree of baffling complexity. Everyone knows what is meant by a "majority," but when the word is used as it usually is, in either a eulogistic or a derogatory sense, it is necessary to know just what majority is meant. There is the majority in the town, in the county, in the state, in the nation, in the whole world—and the larger the field the more difficult is it to know just where the majority lies. Only when strictly defined, spatially and temporally, does the distinction between the majority and the minority hold. Every majority is somewhere a minority, and every minority is a potential majority.

What we have as the reality beneath all these treacherous words is a mass of larger or smaller pressure groups, each striving to express a very limited "will," some openly by reason and persuasion, some secretly by corruption, some when the times are favorable by force and violence.

No one was better aware of this than the realistic Alexander Hamilton, when he was not irritated. Again and again in his defense of the Constitution, he returned to its excellence as a means of preventing the tyrannical rule of any one faction. James Madison was equally explicit on the point. Madison's notes on the debates in the Constitutional Convention reveal that there was constant struggle between the planting interests of the South and the commercial and industrial interests of the North. And these larger interests were in turn subdivided into smaller competing interests which indulged in minor conflicts among themselves. The result was bound to be a compromise, but the genius of the leaders made of the spirit of compromise a working constructive principle of the most fruitful character. The government established consisted of an elaborate system of checks and balances whereby the interests of different groups and sections were skillfully played off against one another—the national government *versus* the states, the Senate *versus* the House of Representatives, the executive *versus* the legislative, and both *versus* the judiciary. No pressure group, it was thought, could at a single time obtain control of all the branches of the government. Meanwhile the Bill of Rights protected the solitary individual against any and every pressure group.

Since the Civil War, however, modern industry has proved able to hurdle all constitutional obstacles, and recently the Anti-Saloon League has learned how to do the trick with regard to its particular interests. The tendency of the various departments of the government to coalesce and form a kind of pressure group of their own,

composed of officeholders, has made the government less amenable to diversified influences and a much more powerful agent of the narrow influences which it actually represents. These narrow influences, usually industrial and always of self-interested minority groups of similar character, have generally been disguised as efforts toward the common welfare. Playing upon the political and religious prejudices of the community, the leaders have not infrequently ended, through the power of auto-suggestion, in hypnotizing themselves into a belief in their own sincerity. Others, genuinely sincere, have followed them in this delusion. Thus the sincere, the half-sincere, and the wholly hypocritical have found a single rallying cry of recent years in the word "patriotism" which Dr. Samuel Johnson bluntly called "the last refuge of a scoundrel."

II. Patriotism on Parade

The love of one's fatherland to which "patriotism" in its root-meaning refers may be taken to be normally instinctive. For it is, quite literally, a part of one's essential self. One's fatherland—one's country—what is it? Is it not a center of warm memories—far-off days when one's parents still were giants and one's home the world—drowsy cats lolling before the winter fire—the strange new race of genial or dangerous dogs—vacant lots shrill with baseball—the first dip in the sea—lonely canyons, skyscrapers and the crowded city—promising schoolmates who came to naught—the men and women one has loved—the men and women who have died before us? Because

one's country is the center of all this, it obtains in one's mind a specious unity which is lacking in reality. It becomes metaphorically a single organic being whose larger life one is privileged to share. The concept of country or nation is not originally economic or political; it is poetic. It is the poem which every man, even the least imaginative, makes out of his own experience.

But there are poems—and poems. To have much value a poem must spring from an experience which is broad and deep. The love of one's country—which is in origin simply the love of one's own personal experience—must develop far beyond its mere instinctive basis. In any valuable form it is not the simple, natural possession of everyone who happens to be born somewhere. It is not immaculately conceived in every citizen. This larger life with which one identifies himself reaches far back beyond his birth and forward to a future when even his grave will be forgotten. This poem at which everyone works, in his degree, is, like all real poems, a high and arduous pursuit. It is nothing less than the good life spread abroad.

The good life of the nation's citizens—this alone is the objective of any real patriotism. And life, good or bad, is as we know largely a matter of habits. The habits of a nation's citizens are called its institutions. These are their settled ways of life, the established order of their existence. All their customary conduct, with the principles by which this is governed, whether or not these principles have solidified into laws; all the habitual organizations through which they carry on their business or

pleasure: all these are the materials with which our poet patriot must deal.

But the nation in actuality, as contrasted with its ideal concept in the mind, being not one, but many, suffers from every weakness of its individual members. Thus the nation never yet existed that did not have its bad habits, its bad institutions. The duty of patriotism is not, as is so often said by those who use words without understanding, "the duty to maintain the nation's institutions." It is not quite so simple as that. Its duty, in the first place, is to discriminate between good and bad institutions, and, in the second place, to strive to make the good ones better. No study could be too laborious, no learning too deep for such a task. The alliance of patriotism, like poetry, is inevitably with scholarship and criticism.

Lovers of poetry may be pardoned if they are impatient with poetasters—particularly when, as occasionally happens, a masterpiece is rewritten by dunces. Exactly that is happening to the poem of the United States. Designed as a Miltonic epic, it is becoming a farce of fools. A complete list of the *dramatis personæ* would be too long to be given here, but some of the most notable of these verbal assassins of patriotism may be discussed briefly, following the close study made by Norman Hapgood in his *Professional Patriots* (1927). Mr. Hapgood's list of organizations differs somewhat from that of the D.A.R., to be given later. It includes the following, with the place and date of birth of each society:

National Civic Federation, New York City, 1900
National Security League, New York City, 1914

American Defense Society, New York City, 1914
Knights of the Ku Klux Klan, Atlanta, 1916
Better America Federation, Los Angeles, 1920
Sentinels of the Republic, Washington, 1922
Allied Patriotic Society, New York City, 1923
American Citizenship Foundation, Chicago, 1923
Military Intelligence Association, Chicago, 1923
Constitutional Anniversary Association, Chicago, 1923
National Patriotic Council, Washington, 1924
United States Flag Association, Washington, 1924
Key Men of America, New York City, 1926

And Heaven only knows how many more have sprung into being since Mr. Hapgood stopped counting.

Deference to the flag perhaps requires that the United States Flag Association be discussed first. This society, whose work has chiefly consisted of giving out instructions in the difficult art of saluting the flag properly, imitates in its organization the infantilism of the Ku Klux Klan. Anyone who contributes twenty-five dollars becomes a "Flag Founder, receiving without cost a beautiful testimonial produced in several colors." Sixty-three "Flag Founders" make one "Living Flag." In each Living Flag every Flag Founder's name appears on every other Flag Founder's certificate and thus "finds its way into sixty-three American homes, where, as an attractively framed document adorning the walls, it will be preserved long after he or she is dead and gone." If in five years one founds five Living Flags he receives a "Patriotic Service Medal" and becomes a "Son of the Flag" or a "Daughter of the Flag," while if in the same period

he founds five hundred Living Flags he receives an "American Cross of Honor" and becomes a "Knight of the Flag" or a "Lady of the Flag." Any suggestion that this private organization is taking too much upon itself in all this casual use of the national emblem is answered by its proclamation:

> Your mail-carrier and yourself, and Mrs. Vanderbilt and her cook, and Mr. Rockefeller and the man who sweeps the street in front of his house can all belong to the United States Flag Association, the big, democratic, patriotic association, destined to become THE GREAT AMERICAN PATRIOTIC SOCIETY.

Evidently the Flag Association recognizes that competition among patriotic societies is rather lively. The picture of Mr. Rockefeller gazing fondly upon the name of Mrs. Vanderbilt's cook adorning his walls is certainly touching. Nevertheless, one feels that there are still larger issues in the world, and that the promotion of military forms of salutation is perhaps not the best way to keep the flag from becoming a purely militaristic symbol. One is hardly surprised that the Flag Association is chiefly supported by such army officers as Captain G. A. Darte, who suggested that a certain professor in Columbia ought to be removed for a few satirical remarks on modern fetich worship.

Another officer who, although probably a member of the Flag Association, is really a whole patriotic society in himself, is the head of the Chemical Warfare Service, who tried to have a teacher in Washington, D. C., dis-

missed for winning a small prize offered by a conservative newspaper of the city for the best definition of Socialism. From the same office was issued in 1923 the notorious Spider Web Chart. This chart traced the lines of affiliation leading from Moscow to such American Bolshevist organizations as the W. C. T. U., the General Federation of Women's Clubs, the National League of Women Voters, and the Women's Joint Congressional Committee. At the bottom of the chart is added a poetic effort entitled "Miss Bolsheviki." Two stanzas may be enough to quote.

> Miss Bolsheviki has come to town,
> With a Russian cap and a German gown,
> In *women's clubs* she's sure to be found,
> For she's come to *disarm* AMERICA.
>
> The male of the specie has a different plan,
> He uses the bomb and the firebrand,
> And incites class hatred wherever he can
> While she's busy disarming AMERICA.

Henry Ford, perhaps attracted by the literary style of the poem or by its highly original rhymes, published a copy of the chart in the *Dearborn Independent*. Immediate protests caused Secretary of War Weeks to order the chart's suppression, despite which it continued to be distributed for some time. Attorney-General Daugherty wrote enthusiastically, "I do not know how I should have got along without it." Unfortunately, as we remember, he was soon unable to get along even with it.

The founder of the Key Men of America (more de-

scriptively denominated by Clarence Darrow "Keyhole Men") prophesied in the *Army and Navy Journal* in 1926 that the so-called "oil scandals" would turn out to be simply a part of Bolshevist propaganda. "There was no scandal," he wrote; "no one sought to rob the government." The child-labor amendment was similarly declared to be inspired by Bolshevist propaganda by that association of Massachusetts manufacturers which called itself "The Citizens Committee for the Protection of our Homes and Children." It was opposed on the same high grounds by the Massachusetts Public Interest League, "composed of a group of women who are jealous of the good name of their state," and by the Sentinels of the Republic, whose ideal of a peaceful community is expressed in their motto, "Every citizen a Sentinel! Every home a sentry box!"

Despite its hood, the most barefaced of all these societies is, of course, the modern Ku Klux Klan, founded by William J. Simmons in Atlanta in 1916. Mr. Simmons, although a professional promoter who had previously done his bit in organizing the Woodmen of the World, was at first unequal to his great ambitions, and the new society languished until in 1921 he took an associate. The organization thus perfected was essentially a business enterprise whose profits were centered in a company which enjoyed the exclusive right to furnish regalia to local chapters, and in a company which brought out the weekly organ of the society. The appeal of the organization was quite deliberately directed to morons, as is seen in the childish names adopted for committees and officers

—Klonvocation, Kloro, Kloncilium, Kloppers, Kleagles, and Wizards, and also in the form of application for charter membership as given in *The Modern Ku Klux Klan* by Henry P. Fry:

> To His Majesty, the Imperial Wizard, Emperor of the Invisible Empire, Knights of the Ku Klux Klan (Inc.).
>
> I, the undersigned, a native-born, true and loyal citizen of the United States of America, being a white Gentile person of temperate habits, sound in mind, and a believer in the tenets of the Christian religion, the maintenance of *white supremacy*, the practice of an honorable clannishness and the principles of "pure Americanism," do voluntarily most respectfully, seriously and unselfishly petition you for citizenship in the Invisible Empire, Knights of the Ku Klux Klan.

The morons responded eagerly in the South and West until within three years men were being lynched in far-off Oregon for opposing the Ku Klux ideals. The society, however, shot too far below the level of average intelligence to enjoy permanent popularity, and its power has greatly declined, although it still exercised considerable influence in the presidential election of 1928. It, or some similar organization, may be expected to reappear sporadically in American history, but for the most part our pseudo-patriots will continue to employ less obvious methods.

Ultimately more important are the well-established pseudo-patriotic organizations of the National Civic Fed-

eration, the National Security League, the American Defense Society, and the Better America Federation.

The National Civic Federation was founded by a former Kansas journalist, and author among other works of *Problems of the United States Coal Industry* (in which he shows what a hard time the poor employer really has), *Shall We Bow to Minority Rule?* (in which he assures us we shall not), and *The Youth Movement* (in which he argues that youth shall not move). He also assisted in preparing the Lusk laws and is reputed to have collaborated in the production of the confidential report made to the United States Steel Corporation on the Interchurch World investigators—a report characterized by Sidney Howard as "a hash of misstatement from beginning to end." The Federation was organized with the ostensible purpose of bringing labor and capital together. This purpose it has pursued in its own way by opposing the child-labor amendment, old-age pensions, and minimum-wage laws. It has been particularly active in support of those industries necessary for the "national defense" in war, especially the chemical industry. It refuses to divulge the sources of its income, and perhaps it is sheer accident that on its executive committee is the president of the Manufacturing Chemists Association, 1923-25, and head of the Hooker Electro-chemical Company, which manufactures chemical gases used in war.

The National Security League was founded through the efforts of a New York corporation lawyer. A congressional investigation of the League's political activities in 1918 showed that it was largely supported by the Du Pont Powder Company, the Remington Arms, and the

steel industries. By a curious coincidence it advocates universal military service and a larger army and navy. Its high motives are emphasized in all its numerous pamphlets, as in the following quotation:

> Help save America! America is in danger of losing her soul. The National Security League offers you the means of putting forth your individual force to help save it.

The American Defense Society has as its president a manufacturer of poison gas. It was founded to aid in the "preparedness" movement preceding our entrance into the World War. During 1922-24 it maintained an office in Washington, D. C., directed by the author of *The Reds in America*, whose statements against Paxton Hibben, published in a newspaper, led to a libel suit and the newspaper's apology. In the single year 1924, according to its report, it was influential in securing large army appropriations from Congress, in assisting the campaign of the Citizens Military Training Camp Associations, and in supplying information to 1,500 newspapers. The general character of the "information" which it supplies is indicated by its description of Upton Sinclair as "contributing editor of the *Liberator*, Communist monthly," and as "founder of the I. W. W. and the American Civil Liberties Union." Like the Civic Federation, it seeks to bring labor and capital together and to this end it offers to employers throughout the country

> a series of pamphlets . . . for use in the pay envelopes of employees. They are intended to impress

> upon the worker the need of his or her coöperation with the employer.

The employer's "coöperation" with the worker is, of course, taken for granted. The society has also sent questionnaires to schools and colleges to learn "the extent to which socialistic and communistic principles are advocated by members of the faculty," specifically listing among these socialistic and communistic principles the initiative and referendum, the recall of judges, and the reduction of the size of the army or navy. It is evident that the American Defense Society is as much concerned as the National Security League to save "the soul" of America.

Another association is the Better America Federation, if that is still its title—for it has had many, dropping its original name of "The Commercial Federation of California" in 1920 and calling itself at various times "The Association for the Betterment of the Public Service," (it is chiefly supported by the public utilities), "The Taxpayers' Association," "The People's Economy League," "The Tax Investigation and Economy League," "The Committee of One Thousand," and "The Committee of Ten Thousand." For three years it employed ex-convicts who traveled up and down the coast testifying at I. W. W. trials, and its chief henchman is now serving a term in San Quentin for accepting bribes. The Better America Federation has been much troubled by the dangers of popular education; in the interest of preserving universal ignorance, so far as possible, it has, at one time or another, prevailed upon the Los Angeles Board of Educa-

tion to prohibit the purchase of the *Nation* or the *New Republic* by school libraries, opposed state appropriations for normal schools, and introduced a bill in the legislature to prohibit teachers from advocating any change in the Federal Constitution. In fact, the concern of the Better America Federation over the Constitution would be pathetic if it were not so impertinent. "To lock the door after the horse has been stolen" has long been recognized as futile, but it has remained for the Better America Federation and its ilk to steal the horse and then themselves lock the door and proclaim that the horse is still inside. Perhaps the Federation is sincere, however, in its regard for the Constitution if "properly understood." In its pamphlet, "America Is Calling to the Students in Her High Schools and Colleges," it asserted:

> If these groups of free thinkers or liberals in America succeed in materially changing our Constitution . . . there will be no profit to worry about in business. Maintenance of the Constitution of the United States is the highest form of business insurance.

The Federation's insurance campaign "to serve canned Constitution to the school children," as Mr. Hapgood well describes it, was initiated in 1923 by a "Gigantic Oratorical Contest" in charge of Mr. Townes Randolph Leigh. Mr. Leigh is a noted chemist, inventor of the placer bomb and of the Leigh fog-screen for protection of vessels against submarines, also the author of *The Citadel of Freedom*, in which he presents his interpretation of the Constitution with all the authority of a chemical expert. The prize-winning oration in the Gigan-

tic Contest bore the slightly reminiscent title, "Our Constitution—the Citadel of Freedom," and told the citizens of the nation that "our ship of state" must "sail on to a greater, grander destiny." The contests were repeated in 1925 and 1926, and in the latter year seventy million people were permitted to hear the winning oration over the radio. Naturally, these great patriotic efforts of the Better America Federation aroused everywhere unstinted praise.

With all these new patriotic organizations showing such activity, some of the older ones began to feel that they had been negligent in their duty to the commonwealth. The Daughters of the American Revolution, particularly, were aroused to heroic efforts to save the state. The D. A. R. blacklist of societies and speakers lists 304 organizations. It includes

> The Y. M. C. A., Y. W. C. A., W. C. T. U., Federal Council of Churches in America, the National Catholic Welfare Council, the Federation of Women's Boards of Foreign Missions, the League of Nations Non-Partisan Association, the National Child Labor Committee, the Philadelphia Yearly Meeting of Friends (Quakers), the Pennsylvania State Federation of Labor, the Summer School of Bryn Mawr College, the Voluntary Parenthood League, the National Association of Child Development, the United States Federal Children's Bureau [Alas, that disloyalty should have crept into the government itself!], the Amalgamated Clothing Workers, the American Association of University Women, the National Educational Association—along with

> John Dewey, William Allen White, Will Durant, Carrie Chapman Catt, Jane Addams, Clarence Darrow, Norman Angell, Irving Fisher, Roscoe Pound, three college presidents—Neilson of Smith, Woolley of Mount Holyoke, MacCracken of Vassar, three senators—Norris, La Follette, Borah, and three bishops—Anderson, Brewster and McConnell.

Perhaps the patriotism of the members of the D. A. R. is so tenuous that it might be shaken by listening to any of these dangerous speakers. Perhaps it is its own business if its members in convention assembled supported the blacklist by a vote of 2000 to 14. "Why should anyone want to address the D. A. R. anyway?" it may be asked. But that is hardly the point. The organization used its influence to prevent those on the blacklist from being permitted to speak elsewhere as well as before its own chapters. And yet its president, Mrs. Alfred J. Brosseau, could state: "Our society has in no way interfered with free speech." One feels that Samuel E. Morrison, professor of American history in Harvard, whose grandmother was one of the incorporators of the society, may be right in saying:

> The youngest foreign-born child taking his first American history in our primary schools has a better knowledge of the spirit of the American Revolution than the present spokeswomen of the D. A. R.

Among all these super-patriots, it is greatly to the credit of the American Legion that it does not make a particularly remarkable showing. Perhaps half of its members were really in France, a considerable number

were actually under fire, and most of these men have felt little need of the thrills to be obtained in the inglorious war against free speech. When one recalls the record of the G. A. R. after the Civil War, the American Legion in comparison seems a very decent, self-respecting institution. In fact, one of the ablest defenses of liberalism recently published, "There's Only One Kind of Americanism," by Rupert Hughes, appeared in the *American Legion Monthly*, July, 1927. Nevertheless, not to mention the occasional lawlessness of some chapters and the interference of others with freedom of teaching in the schools, the American Legion, officially at least, has usually stood with the other organizations mentioned above for the policy of reaction. It was at the invitation of the League that the "All American Conference" of sixty-two "patriotic societies" was held in 1924 in the auditorium of the Department of the Interior in Washington. This Conference passed a series of resolutions, of which two sufficiently indicate its general disposition: refusal to regard America's entry into and conduct of the war as a debatable question; demand for "unadulterated and undiluted American history in American schools"—a resolution which needs to be interpreted in the light of the preceding. Just how undiluted historical knowledge is to be secured when important historical questions are considered undebatable, none of the sixty-two "patriotic societies" explained. The Conference claimed to represent twenty millions of American citizens—a formidable number. But do twenty millions represent a major minority or a minor majority?

Behind all this lies what Carlton Hayes in his thought-

ful *Essays on Nationalism* (1926) maintains to be the spirit of a new religion, an emotional drive toward something—the citizen knows not what—vaguely connected with high ideals or at least with high-sounding names. "Is it not a demonstrable fact," writes Mr. Hayes, "that nationalism has become to a vast number of persons a veritable religion, capable of arousing that deep and compelling emotion which is essentially religious." He goes on to point out acutely that nationalism, like other religions, has its sacred books immune to criticism, its parades, processions, and pilgrimages, and even its ritual. The extent to which all this folly may be carried is shown by the services, to which Mr. Hayes calls attention, held at St. Mark's-in-the-Bouwerie in 1924. The following is not, as might perhaps be supposed, a satirical account in the *New Yorker*, but a sober news item in the New York *Times*, February 25, 1924:

> The ritual expressing the religion of Old Glory was taken from a book of that title published by the rector of St. Mark's, Dr. William Norman Guthrie. . . . The worship of the flag was performed on a platform in front of the chancel by professional actors designated as Chief Officiant, the Son; First Assistant, the Mother; and Second Assistant, the Father. The rector named the seven impersonators of the red stripes in the flag as Washington, Jefferson, Jackson, Lincoln, Cleveland, Roosevelt, and Wilson.
>
> The white flagstaff was placed in front of the sanctuary, topped with a golden sphere over which

hovered the golden eagle. The congregation was addressed as follows: "At the top of the flagstaff hovers the emblem of our sovereignty, the white-hooded eagle. He expresses our aspiration and our inspiration, our living communion with the God of our fathers." This was followed by the psalm of the eagle. After the psalm the Chief Officiant cried aloud: "Hear ye the cry of the eagle." The congregation responded, "Let us rally to obey." The flag was raised to the singing of the first stanza of the "Star-spangled Banner," while the Chief Officiant said: "Let us raise a standard, to which the wise and honest can repair."

In the second part of the ritual the congregation were bidden to lift up their eyes to the seven red stripes, "as they are well worthy of worship." This chorus followed:

"Let us sing together our song
To the red of the flag,
The red of the flag,
The red of the flag,
The red of the flag forever."

In like manner was performed the ritual worship of the six white stripes, the square of the midnight blue, the five-pointed white stars. The final ceremony was the worship of the white-hooded eagle.

As no super-patriot is likely to surpass Dr. William Norman Guthrie, we may appropriately end this section with the picture of the congregation of St. Mark's shouting the cry of the white-hooded eagle and singing

Dr. Guthrie's wonderful hymn to the red of the flag forever.

III. Religion Under Cover

The suppression of offensive political opinions is an application in another field of the old religious custom of heresy-hunting, pursued with vigor from the first to the eighteenth century. The practice was defended on the ground that a man should have freedom only to teach the truth, not to propagate error. This, of course, meant that Catholics could persecute Protestants for their erroneous opinions and Protestants could persecute each other for the same reason. Until there is more certainty as to "the truth" than human beings seem ever likely to attain, freedom to teach the truth, in spite of its high sound, means only freedom to teach whatever does not offend current beliefs. Nevertheless, heresy trials continued in the churches long after they were abandoned in politics. But as in modern times they have concerned only church members, not the general public, and as the punishment is no longer burning at the stake but mere expulsion from the church, the general public has been content to smile and pass by. Recently, however, one particular sect, strong not in numbers but in fanatical zeal, has reverted to medievalism and attempted to coerce the general public, not, of course, by burning authors at the stake, but still by the good old custom of burning or otherwise destroying their books. I refer to Christian Science.

Mrs. Eddy, who had much personal experience of the

mental discomfort caused by hostile comment, sought to preserve her followers from such unpleasantness—and, incidentally, quite incidentally, to preserve her own reputation from possible undermining at the hands of future higher criticism—by issuing the fiat:

> A member of this Church shall not patronize a publishing house or bookstore that has for sale obnoxious books.—*Church By-Laws.* Article VIII, Section 12.

The Eddy boycott was brought into play as soon as an authentic biography of Mrs. Eddy appeared, *The Life of Mary Baker G. Eddy and the History of Christian Science* (1909), by Georgine Milmine. Miss Milmine had been assisted in the collection of material by Willa Sibbert Cather, George Kibby Turner, Burton Hendricks, Will Irwin, and others. Her work, carefully documented and convincing, had already run as a serial in *McClure's Magazine* in 1907, and when published in book form seemed likely to attain a wide circulation. Then suddenly as if by magic the book disappeared from the bookstores, and the publishers declined to furnish copies. The details of what happened have never been made public, but it is sufficiently evident that a good book was secretly murdered; far from denying this, Christian Scientists have been wont to boast of it as an evidence of their power and influence. Meanwhile the Church had hired a writer, Sibyl Wilbur (O'Brien) to write the "official" *Life of Mary Baker Eddy* (1907), which, after the suppression of Miss Milmine's book, remained the only source of public information.

In 1921 an entire volume of the *Cambridge History of American Literature* was withdrawn by the publishers, after publication, under Christian Science pressure because of an "obnoxious" chapter by Woodbridge Riley. In 1923 *Mrs. Eddy as I Knew Her in 1870*, by Samuel Putnam Bancroft, was suppressed after four copies had been sold, and in 1927 *The Memoirs of Mary Baker Eddy*, by Adam Dickey, followed it into enforced oblivion, because, although both books were written by Christian Scientists, each was deemed "obnoxious" by the Board of Directors of the Mother Church in Boston. In fact, one of the most "obnoxious" of all books is the first edition of *Science and Health* itself, owing to its faulty style and divergencies from later editions; so notorious have been the attempts of Christian Scientists to destroy all copies that in the Library of Congress no one is permitted to see the first edition save in the company of a guard.

In the late summer of 1929, when Edwin Franden Dakin's *Mrs. Eddy: The Biography of a Virginal Mind*, was published by Charles Scribner's Sons and immediately acclaimed by reviewers all over the country as a remarkably judicious and illuminating study, the Church at once adopted its usual methods of intimidation toward both publisher and booksellers. The following excerpts from letters are samples of the more or less open threats which Scribners' received by the score.

Edmonton, Alberta.

I trust you will realize that I am writing this in a very friendly way, but I would also point out that

I could not purchase books from a house publishing such objectionable matter and, as you doubtless will realize, there will be many, many more purchasers of books who will feel as I do.

Brooklyn, N. Y.

Your part in this publication will not do your house any good, I assure you, for there are hundreds within my knowledge alone, who will never do business with your concern again . . . My grandfather . . . came here in the *Mayflower*, and scores of others after him. As a citizen I am, of course, against censorship in the broadest sense.

Brooklyn, N. Y.

If you, in any measure, value the patronage of members of this organization, it hardly seems as though you are using an intelligent method of gaining their good will.

New York, N. Y.

I could not conscientiously make any more purchases of Scribners' publications, and I am only one of many thousands that feel the same way. It is to be heard on every side.

New York, N. Y.

After reading the review of a book that you have just published called *Mrs. Eddy: The Biography of a Virginal Mind*, by E. F. Dakin, I wish to inform you that I, for one, will never patronize your shop again and if there is any way that I can keep others from buying books at your store I will endeavor to do so.

Third Church of Christ, Scientist,
Kansas City, Mo.

[After quoting the By-Law] We are calling your attention to this, feeling that if you understood the circumstances you would not want to be instrumental in putting out a publication which was not true and might be detrimental to you.

San Francisco, Cal.

To lose or win the confidence of rather a large circle of individual thinkers for future publications is a matter that lies entirely with your good selves.

Chicago, Ill.

May I please suggest that the good will of "interested partisans," loyal Christian Scientists, might be something for Charles Scribner's Sons to consider—ponder over?

Miami Beach, Fla.

While rightly minded people do not want to boycott anyone, they simply have to shun all such publications as yours and everything connected with your concern of any nature whatever.

Mr. Dakin received the following literary advice from a Christian Scientist in Bridgeport, Conn.

Never write a Biography of any one. Unless you have know and been in their home to get the truth of a person. To all C. Scientist you are to them a Coward and lower than a Worm. The book and publisher will be boycott by all Christian Scientist.

There is not the slightest evidence that any of these writers had ever read the book, and, in all the mass of correspondence received by Scribners', there was not a single definite error pointed out in Mr. Dakin's work.

Meanwhile, typical experiences of local booksellers were these:

Cleveland, Ohio.

> The Christian Science Publication Committee for Ohio has been quite insistent that we discontinue the sale of "Mrs. Eddy", or at least put the books underneath the counter. I refused definitely to do this, but on account of the good number of patrons who are Scientists I did agree not to feature the book. . . . I am interested to see what you are doing in the matter, as I know that a great deal of pressure has been brought to bear.

Detroit, Mich.

> Due to the violent protest of the Science Church in our city and boycott on our store by these good people, we have been forced to withdraw the sale of your book "Mrs. Eddy" from our store. We are not in business to offend classes, and this group of people are good book-buyers and are very close friends of our establishment. We are the third bookstore in our city to withdraw the sale of this book.

By the end of the fall the majority of the book-dealers were thoroughly cowed; 70 per cent of them either returned their copies or were keeping them under the counter or in the cellar; it began to look as if Dakin

would go the way of Miss Milmine. But Scribners' stood their ground. With heroic belief that there is a limit to suppression of speech even in America, the firm sought and gradually gained public support. The *Nation*, the *New Republic*, and other liberal magazines energetically took up the cause. And now a new edition of Dakin's book has been brought out at popular prices, accompanied by a pamphlet, "The Blight that Failed," which gives exceedingly interesting details of the attempted suppression.

The victory of Charles Scribner's Sons may perhaps later come to be looked back upon as the first step in the recovery of American freedom of speech; or it may prove to be a mere incident, quickly forgotten. If it is to be the former, even in relation to Christian Science alone, it must be followed not by a relaxed but by a sharper vigilance toward that particular Church. The under-cover activities of Christian Scientists have by no means been confined to the suppression of "obnoxious" literature. The official *Christian Science Sentinel*, October 5, 1929, proudly mentions instances of success in two other fields, the drama and education—instances which, while unimportant in themselves, sufficiently indicate the Church's attitude:

> *Extracts from Reports of Christian Science Committees on Publication*:
>
> . . . A play containing misleading references to Christian Science was produced at a theater in Burbank, but when the objectionable lines were brought to the attention of the management of the theater,

they were promptly deleted from the play. When the motion-picture version of this same play was being photographed at the studio of a large motion-picture corporation, the Committee wrote the associate producer asking that all references to Christian Science be omitted from the titles. The associate producer showed his respect for Christian Scientists by replying, in part, "We deem it quite sufficient that you request this omission to have it granted immediately. . . ."

A play given in Santa Barbara contained a misleading reference concerning our religion, but a Christian Scientist who was acting in the play reported it to the Assistant Committee on Publication, and the director graciously eliminated the objectionable reference.

. . . An instructor in a university made references in his classroom which were antagonistic to Christian Science and to Mrs. Eddy, but after the subject was laid before an official of the university he replied in part, "I am humiliated that any instructor in our staff should go out of his way to discuss a matter which does not pertain to our responsibility at all. Please be assured of our desire to be entirely cooperative in all such ways."

The term, "Committee on Publication," has come to have an unusual meaning in the Christian Science vocabulary, where it now refers primarily to committees not for the promotion but for the suppression of publication. With these committees well organized in every state, the

Church has become the finest possible example of a modern pressure group intent on its own power. If its methods are permitted to be successful, they will surely be followed by other, and numerically stronger, religious organizations.

CHAPTER X

Liberty Frightening the World

Liberty, Statue of, the name of a colossal statue on Bedloe's Island in New York Harbor. On 28 October 1886, after more than 12 years of preparation, this statue given by the people of France to the United States, was unveiled. . . . It was built by popular subscriptions in France to commemorate the hundredth anniversary of American independence.

—*Encyclopedia Americana*

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CHAPTER X

Liberty Frightening the World

I. Count Kossuth and Count Karolyi

In the revolutionary year 1848 Hungary rose in rebellion, under the leadership of Count Louis Kossuth, against the foreign rule of Austria. The revolt would probably have been successful had not Russia come to Austria's aid. It failed, and Kossuth fled to Turkey. By direction of the United States Congress, the President then tendered the vanquished patriot the use of the United States frigate *Mississippi* to bring him and his associates to America. When Kossuth's party arrived in New York Bay, a salute of thirty-one guns was fired from the fort on Governors Island, the United States warships in the harbor saluted, and whistles were blown by all the ferryboats. From the crowd of 100,000 people waiting at the Battery, Kossuth on landing received an ovation unequaled since the visit of Lafayette. This was his greeting in New York; the account of his official reception in Washington may be given in the words of James Ford Rhodes (*History of the United States*, Vol. I.):

> The ceremony [in the Senate] was the same as that which twenty-seven years before had governed the

> welcome to Lafayette. At one o'clock on the 5th of January the doors were opened, and Governor Kossuth, escorted by the committee—Shields, Seward, and Cass—entered and advanced within the bar, all the senators at the same time rising. The suite of the honored guest, in military uniforms, stood below the bar. Shields said: "Mr. President, we have the honor to introduce Louis Kossuth to the Senate of the United States." The presiding officer addressed him: "Louis Kossuth, I welcome you to the Senate of the United States . . ." The Senate, in order to give the senators an opportunity of paying their respects to their guest, adjourned, and they were individually presented. . . . Two days after this reception, a banquet was given to Kossuth by members of Congress of both parties, at which Webster made a noteworthy speech.

Seventy-seven years later another vanquished Hungarian patriot, Count Michael Karolyi, came to the United States, but there were now no salutes, no whistles, no reception in the Senate. Instead, there was a grudging and qualified "permission" to enter, and this although the exile was no other than the first president of the Republic of Hungary, established at the close of the World War. Perhaps one recalls that "the self-determination of peoples" was one of Mr. Wilson's Fourteen Points—perhaps not, since the Fourteen Points are now as much forgotten as the Seven Wonders of the World described by Herodotus. At any rate, it was owing to the newly won Hungarian "self-determination" that

Count Karolyi was chosen president, but his liberal government was overthrown by the Communists,—which, one might have supposed, would have endeared him all the more to America. But since that time the Communist government had in turn been overthrown by the military dictatorship of Admiral Horthy, who had seized Karolyi's private estates spared by the thieving Communists. And the United States government loves a military dictator even more than it hates a Communist. So by order of Secretary of State Hughes, acting under war powers which had never been repealed, Count Karolyi was permitted to enter only on condition that he should make no political speeches. By this arbitrary action the citizens of the United States were prevented from obtaining any knowledge of Hungarian affairs from the one man most able to inform them. Five years later, when no one is any longer interested in Hungary, Count Karolyi has been graciously permitted by Secretary of State Stimson once more to enter the United States, this time apparently to enjoy such freedom as any other foreign visitor enjoys.

The Charles Evans Hughes responsible for the Karolyi ban of 1925 must not be confused with the Charles Evans Hughes who in 1920 appeared before the New York Assembly in behalf of the expelled assemblymen. That Mr. Hughes was a private citizen free to follow his convictions of justice; this Mr. Hughes was United States Secretary of State. So also, it may be replied, was Daniel Webster in the time of Kossuth. But the state of which each was Secretary was not at all the same state. Daniel

Webster represented a mature republic, Charles Evans Hughes an adolescent empire.

II. The Empire of the United States

In 1898 the United States undertook its crusade against Spain in behalf of the downtrodden natives of Cuba. Tales of Spanish cruelty and oppression, some true, more of them probably false, but all believed, had been featured in the newspapers to such an extent that a considerable part, at any rate, of the American people were ready to respond to what they supposed to be the call of the helpless islanders. The war had all the fine traditional features of a struggle against monarchical tyranny. It might perhaps have been less popular if President McKinley had not forgotten to make public the fact that the Spanish government had already accepted all our demands in regard to Cuba before ever war was declared.

At the end of a struggle much easier than we had expected, we found ourselves, to our great surprise, in possession of the Philippines and Porto Rico. Nothing had been further from our thought than any acquisition of foreign territory. But justice to the natives of these islands seemed now to require that we should protect them from themselves and the misgovernment that might result if they were permitted their independence. It was unfortunate that the natives sometimes misunderstood our motives, particularly in the Philippines. There, after Admiral Dewey's victory in Manila Bay on May 1st, he had been obliged for some months, through lack of soldiers,

to rely upon the Filipino troops under Aguinaldo to invest the capital on the land side. The Filipino leader had been permitted to issue proclamations, from a printing press furnished by Dewey, assuring the islanders that the Americans had come to bring them independence—proclamations which the Admiral took the wise precaution not to read. All this and more was brought out in Dewey's hesitating and self-contradictory testimony before the Senate committee in 1902 (to be found in *Senate Document No. 331*, Part III, 57 Cong., 1 Sess.). Hence the Filipinos were sadly disappointed when they learned that they would not receive their independence until they proved themselves worthy of it. (The Philosophy of Calhoun—see Chapter II.) This they have apparently been slow to do, since after a quarter of a century they are still in leading strings. The Democratic Party, to be sure, which while in power from 1912 to 1920 had been certain they were unfit for self-government, when out of power in 1924 discovered that they had suddenly become fully qualified for such an arduous task and rebuked the Republican administration sharply for its dilatory tactics. And today the invasion of American markets by tariff-free Filipino sugar and vegetable oils has once more brought the subject to the fore, and a senator from a beet-sugar state has introduced a resolution for the independence of the islands. But surely it would be safer simply to pass discriminating tariff measures and wait until the Filipinos have produced a few great statesmen such as Harding, Daugherty, and Fall, or a few well-governed cities like Chicago.

The Spanish War also left us with embarrassments in the Caribbean, but these we have surmounted even more successfully. The record of our achievements there was summarized by Professor William R. Shepherd of Columbia University in his article, "Uncle Sam, Imperialist" in the *New Republic*, January 26, 1927:

> In about thirty years we have created two new republics—Cuba and Panama; converted both of them and three other Latin-American countries—the Dominican Republic, Nicaragua, and Haiti—into virtual protectorates; intervened by force at least thirty times in the internal affairs of nine supposedly sovereign and independent nations; made the period of intervention last anywhere from a few days to a dozen years; enlarged our investments from a paltry two or three hundred millions of dollars to the tidy sum of upwards of three billions, and installed in four states our own collectors of customs to insure payment. Incidentally, we have annexed Porto Rico and the Virgin Islands, built a canal, secured an option to construct another, and gathered in several naval stations.

Some of the details of these events are interesting. In April, 1898, just before the Spanish War, Congress had asserted that the control of Cuba would be left entirely to the Cuban people without interference from the government of the United States; in 1903 the Cubans were forced to incorporate in their Constitution provisions giving the United States the right to intervene at any time

for the maintenance of an established government, and forbidding Cuba to contract excessive indebtedness; the second clause apparently meant "excessive indebtedness to other governments than the United States," as in the single year 1918 the latter imposed upon her ward a forced loan of fifty million dollars as a lien upon the entire national revenue.

The economic value to the United States of a canal across either Panama or Nicaragua had been discussed long before the Spanish-American War, but the Central American states were slow to coöperate; so in 1903 a rebellion was fomented in a portion of Colombia, and the resultant paper republic was immediately taken under protection by the United States government under President Roosevelt.

In 1905, owing to disturbances in Santo Domingo and danger of foreign intervention, Ambassador Thomas Dawson engineered a treaty placing the collection of customs in the hands of the United States. When this treaty was rejected by the United States Senate, President Roosevelt appointed the collector anyway, and later a more obedient Senate sanctioned the *fait accompli* by a new treaty.

American marines have been continuously in Nicaragua since 1912, safeguarding American investments which have become enormously profitable to the investors; but the native Nicaraguan has profited hardly at all from this industrial development of his country, as, according even to the avowedly imperialistic W. W. Cumberland in his *Nicaragua* (1927),

> It may be safely assumed that the average Nicaraguan has far less than $40 in cash for annual disbursement.

Our purposes, however, have continued to be most pure. Dr. Dana G. Munro, now chief of the Division of Latin American Affairs in the Department of State, thus summed them up in an article in *Current History*, September 1927:

> Since we have no desire whatever to establish any permanent control ourselves, we can only safeguard our vital interests by endeavoring to help these nations to reach a point where they can manage their own affairs in a manner which will leave no pretext for interference by ourselves or by any one else. This has been the central purpose of our Caribbean policy during the past twenty years.

How we have helped these nations to "manage their own affairs" is perhaps best seen in the case of Haiti. At the time of our first intervention in 1915 Rear-Admiral Caperton issued a proclamation: "I am directed by the United States government to assure the Haitian people that the United States has no object in view except to insure, establish and help maintain Haitian independence," which the Haitians, without any assistance, had already maintained for over a hundred years since the time when they drove out the French. How they were to maintain it *with* our assistance soon appeared. In 1916 the Haitian Assembly refused to accept a Constitution made in Washington and was promptly dissolved by

American troops; the same thing happened the next year; since then no Haitian Congress has been permitted to assemble. In 1920 a puppet-president, appointed in contravention of the Haitian Constitution by a "Council of State" of five members, was installed in office by American bayonets. There was a desperate revolt of the natives in which 2,000 were killed. Since that time there has been a Roman peace under the military dictatorship of General Russell.

It is often said that the Central American states have no genius for Anglo-Saxon constitutional government. But the fault, perhaps, lies in the climate, since Americans have shown no great genius for it, either, in the Caribbean. Nevertheless, it may be urged, all these island dependencies, however unjustly acquired, do not make the United States an "empire" in the usual sense of that word, as long as the United States government is controlled by the people. The objection is true but unfortunately quite irrelevant. Have the American people been consulted at any point in this long series of encroachments upon foreign liberties? Only those members of the American people who happen to have their offices in the White House or the Department of State. Despite the American Constitution, the President has now by long tradition come to have the power of declaring war without the consent of Congress—if he calls the war an "intervention." Even Senator Borah, chairman of the Foreign Relations Committee of the Senate, seems to have spent most of his time these many years in a vain attempt to find out just what is going on. As for the American

people—the American people have had nothing more to do with it all than the Wild Man of Borneo.

III. Is it Well to be Hated?

It is perhaps just because most of us have had so little to do with the establishment of American imperialism that we can be so complacent about it. We refuse to take the unpleasant thing seriously. Thus Senator Henrik Shipstead of Minnesota is quoted as saying, with regard to a few recent riots in Haiti,

> I am confident that all that is necessary to establish peace and allay discontent is a promise from the government of the United States that the Haitian people will be given an honest election and a promise that their government will be restored to them.

Are fifteen years of tyranny to be wiped out so easily? More promises from a government that has broken every promise it ever made to the Haitian people! Not words, nor Pan-American conferences of professional diplomats, but years of fair dealing would be necessary to remove the hatred of the United States felt not only in Haiti, but in every Caribbean and Central American state.

Well, we are strong enough to laugh at their hatred? Perhaps, if that is the way one looks at it. But how about Europe? What, Europe, too, when we so recently went to war for the sake of Europeans, making it clear beforehand that we sought no personal gain! Alas, we have been so unfortunate in the way events have turned out.

We wanted no territory from the Spanish-American War, but events forced much territory upon us; we wanted no gold from the World War, but events forced us to take much gold. And every citizen in the leading nations of western Europe gives—and for years to come will give—no inconsiderable portion of his annual income to the undesiring United States of America. We have a legal claim; no doubt of it. So Shylock had, until routed by Portia's technical quibble. But are war debts, paid unwillingly, so much better than the gift of Statues of Liberty built by popular subscription? Never again will any foreign people send us such a gift.

We cannot expect the European to look into our innocent inner consciousness; he judges, necessarily, by the external facts. And the outstanding fact of his experience is that the United States is the one nation that has grown more powerful through the World War—so powerful that it constitutes a threat to every other nation. André Siegfried writes in *America Comes of Age* (1927):

> . . . America may feel she can do as she likes without consideration for anyone else. She can act as arbitrarily as she pleases. She can strangle whole peoples and governments, or she can assist them on her own terms. She can control them and indulge in the pleasant sensation of judging them from her superior moral height, and then impose her verdict. This is bad not only for Europeans who are humiliated, but also for Americans; for their sovereign independence makes them less and less willing to accept international obligations.

Europeans are as a rule courteous, and are conscious of individual personality as we are not; but who that has been in Europe since the war is not aware that the courtesy he has received has been bestowed not *because of* but *in spite of* the fact that he is an American? Bernard Fay, than whom no kindlier critic of America exists, in his book, *The American Experiment* (1929), warns us not to be deceived by the utterances of official statesmen into overlooking the growing hatred of America in the European masses. The United States has replaced Germany as the chief object of European fear, and, just as with Germany, this fear is mingled with cultural contempt. The raucous manners of American tourists, the crude ideals of American mass production, the absurdities of prohibition, the still greater absurdities of our censorship of learning about to be discussed—all these cause the American to be laughed at as a barbarian, while it is also evident that he has the strength of a barbarian. He incarnates to Europeans the terrible threat of a triumphant lower form of civilization. Thus "European *vs.* American Civilization" is the sinister title of the last chapter of André Siegfried's work.

Are this fear and contempt unjustified? If so, it is not the fault of our exploiting industrialists, militarists, and rabid reformers; it is not the fault of our imperialistic government. If we continue to follow our present leaders, the path is clear and the goal to which it will conduct us is certain. This goal is not a new one. The past has seen many wars of one against the world—Spain, France, Germany—and the world has always conquered. In the

year 1916 William Trotter in his *Instincts of the Herd* expressed the views of thousands when he wrote:

> I am much more likely to get into reasonable relations with the truth if I admit to myself quite frankly, my innermost conviction that the destruction of the German Empire is an indispensable preliminary to the making of a civilization tolerable by rational beings.

In the year 2016 will new William Trotters in every land be writing the same words of the United States?

CHAPTER XI

Comstock Stalks

To mind one's own business, and not be meddlesome, is justice.

—PLATO

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CHAPTER XI

Comstock Stalks

I. Comstock and the Lady Brokers

Nothing could be much sadder than the rejoicing of Massachusetts liberals this winter over the introduction in the legislature of a bill revising the Massachusetts censorship of literature and art. The proposed statute is the work of the Massachusetts Citizens Committee for the Revision of the Book Law, which includes a number of prominent clergymen and such well-known writers and educators as Philip Hale, Walter Prichard Eaton, Bliss Perry, Ellery Sedgwick, F. W. Taussig, William A. Neilson, and Mary E. Woolley. These names are a sufficient guaranty that the measure is as liberal as it could be made with any chance of success. But when the committee imagines that this act will remove "the ridicule of the entire civilized world" from at least one state in the Union it is unduly hopeful. That in what was once called the land of freedom such a law is now regarded as "liberal" is in itself the most bitter of comments upon present conditions. The measure reads:

> Whoever imports, prints, publishes, sells or distributes a book, pamphlet, ballad, printed paper or

other thing which, considered as a whole, is obscene, indecent or impure or manifestly tends to corrupt the morals of youth, or an obscene, indecent or impure print, picture, figure, image or description manifestly tending to corrupt the morals of youth, or introduces into a family, school or place of education, or buys, procures, receives or has in his possession any such book, pamphlet, ballad, printed paper, obscene, indecent or impure print, picture, figure, image or other thing, either for the purpose of sale, exhibition, loan or circulation or with intent to introduce the same into a family, school or place of education, shall be punished by imprisonment for not more than two years and by a fine of not less than $100 nor more than $1,000.

The gain in this law over previous legislation is that it forces the censor to consider the whole of a work instead of his being permitted, as heretofore, to condemn it on the basis of detached phrases, but it still leaves publishers liable to punishment of two years imprisonment and a fine of $1,000 for a crime whose meaning no man knows. Worse still, it puts librarians in the same predicament, and even the honest *pater familias* trudging home with a copy of Rabelais under his arm. For, I repeat, no one can know in advance of the court's decision whether a given work comes under the law. This, among other points, will be adequately demonstrated in what follows. First, however, let us turn to the history of this obsession of modern Americans that so many of their fellow-countrymen are obscene.

In the golden days of 1835 the good Alexis de Tocqueville wrote, "Attempts have been made by some governments to protect the morality of nations by prohibiting licentious books. In the United States no one is punished for this sort of work." The statement, to be sure, was a little too optimistic even for that early date. Laws prohibiting "obscene" literature had been enacted by Vermont in 1821, and by Connecticut in 1834; a similar law was to be entered in the Massachusetts statutes of 1842. In the latter year Congress forbad the importation of "indecent" pictures into the United States, and in 1857 a strengthening amendment was added to this Act. In 1865 the practice which had developed during the Civil War, of granting wide powers to the federal government, slopped over casually into the censorship of art and literature, as in that year a fateful provision was adopted, slightly altered in 1872, prohibiting the transmission of objectionable books and pictures through the mail. But there was one saving grace in all these laws: it never occurred to anyone, apparently, that they should be enforced. In 1866, however, the Young Men's Christian Association of New York City became alarmed over the reading habits of the Christian young men in their care, and introduced at Albany a bill, later enacted, which they really desired to see enforced. Nevertheless, little was accomplished until in 1872 the Association obtained the services of a young dry-goods salesman with ginger-colored whiskers and a genius for publicity, who had already turned his hand, as a self-appointed sleuth and stool-pigeon, to securing the arrest of a few violators of the law. This young man, born and reared in the

village of New Canaan, Conn., with little education, unable to spell or write correctly, but with a boundless zeal to reform the world, was named Anthony Comstock.

In the service of the Christian young men, Comstock at once proceeded to make himself ridiculous—and known—by securing the arrest of two un-Christian and not-so-young women, Victoria Claflin Woodhull and Tennessee Claflin, editors of *Woodhull and Claflin's Weekly*. The sisters, a few years before, had come out of the West, where Tenny had been running a quack cancer sanitarium, to open a brokerage office in Broad Street, backed by Commodore Vanderbilt. Victoria, of pale tragic countenance and lurid eyes, was an ardent feminist whose speeches, according to one admirer, "made our flesh to creep and our blood to run cold." She had been nominated for President of the United States in May, 1872, by the Equal Rights Party, and had represented the Women's Rights Association before the House Judiciary Committee in Washington. Non-feminists regarded her as a very dreadful person. She had kept on friendly terms with her divorced husband, Dr. Woodhull; in itself a sufficient sign of immorality. Now in the November 2nd issue of the *Weekly* she told the whole story of the liaison of Henry Ward Beecher and Elizabeth Tilton just as she claimed to have heard it from both Tilton and his wife. As a psychologist, Victoria was considerably in advance of her period: substitute "libido" for "amativeness" and few Freudians would object to her summing up of the situation: "The amative impulse is the physiological basis of character. It is this which emanates zest and magnetic power to his whole audi-

ence through the organism of the great preacher. Plymouth Church has lived and fed, and the healthy vigor of public opinion for the last quarter of a century has been augmented and strengthened from the physical amativeness of Henry Ward Beecher." Tilton's complaints, on the other hand, Victoria thought, were caused by "*bogus sentimentality, pumped* in his imagination, because our sickly religious literature and Sunday-school morality and pulpit phariseeism had humbugged him all his life into the belief that *he ought to feel and act* in this harlequin and absurd way on such an occasion." The same issue of the *Weekly* also contained an exposé of a broker, Luther C. Challis, whom it accused of having committed not only the venial sin of seducing two young damsels at the French ball but the capital offence of boasting of the act afterward.

The young dry-goods salesman from Connecticut at once seized this splendid chance to put over his new wares. He succeeded in having the sisters arrested, not on the charge of libel, which might have raised the question of the truth of their allegations, but on an obscenity charge. They were lodged for a month in Ludlow Street Jail, awaiting trial. Meanwhile the indiscreet Challis did bring a libel suit. This was tried first. The broker charged the sisters with having tried to blackmail him, while they asserted that he had tried to bribe them into retracting their statements; it came out that he had made Tenny a gift of underwear and had been seen to kiss her. All New York laughed at what the *Herald* called "the sensational comedy of free love."

The colorfulness of the whole scene was enhanced by

the entrance on the stage of George Francis Train, eccentric millionaire, friend of Louis Napoleon and other royalties, who had but lately returned from a trip around the world in eighty days. Train sprang to the rescue of the beleaguered sisters. As a bait to the Comstockians, he began to issue a newspaper called the *Train Ligue*, in which he demanded the suppression of the Bible Publishing Company for printing "disgusting slanders on Lot, Abraham, Solomon, and David." When nothing happened, he published certain sections of the Old Testament himself under sensational headings. Comstock at last rose to the worm dangled before him, and the comedy turned to farce. Train was arrested and taken to the Tombs, from which he issued blithe statements to the press, announcing that on his release he would found a Commune with himself as dictator and that his first act would be to hang all members of Congress. This engaging promise prejudiced a good many of the community strongly in his favor. When he was at last brought to trial, his lawyers entered a plea that he was mentally unbalanced, and the judge, after summarily instructing the jury to acquit on the ground of insanity—which the obedient jury did—then stated that he would send the prisoner to the Utica insane asylum. Train thereupon rose and gravely moved that the judge be impeached. Such inspiring faith in the principles of liberty could not be rewarded with an asylum. Train was released, and, to Comstock's infinite relief, he soon departed to Europe.

Meanwhile Victoria, out on bail, attempted to deliver a speech on "Moral Cowardice and Modern Hypocrisy" in Boston. But the officials of that city were already pe-

culiarly sensitive on such topics. The chief of police and the City Council, aided by Governor Claflin—perhaps eager to keep his own family name from being sullied by the terrible western Claflins—refused to permit the speech. Victoria then announced that she would deliver one in New York City—under an even more outrageous title, "The Naked Truth." This speech she is said to have managed to give at Cooper Institute by getting past the officials at the door in the disguise of an old Quaker lady who ascended the stage, threw off her coal-scuttle bonnet and gray cloak, and spoke for an hour and a half before the dumfoundered minions of the law recovered from their astonishment. During the winter, however, the tireless Comstock still pursued the sisters. They were in and out of jail until their bail had risen to $60,000. Finally, in June, 1873, the case against them was ignominiously dismissed.

The only person to suffer seriously from the whole affair was the knight-errant Train. Owing to the court's declaration of his insanity he was destined to lose most of his property. Years later the erstwhile gay millionaire returned to New York, where he lived in miserable lodgings on Bleecker Street, subsisting largely on peanuts, until his death in 1904. Victoria Woodhull and Tennessee Claflin gradually reformed their ways, eventually married Englishmen of good position (Tenny becoming Lady Cook), and in their old age are said to have been much concerned over the spread of obscenity in modern fiction. But the one figure to derive solid profit from the hectic year 1872-73 was the defeated crusader, Anthony Comstock. At the beginning the *Brooklyn Eagle* had said of

him slightingly, "As to Mr. Anthony Comstock, we never heard of him till he 'ranged himself' in legal company with the Claflin Sisters as their prosecutor and world-wide advertiser. Even then we never referred to him, for the same reason that we do not refer to last year's flies—he is entirely unimportant." But long before the end of the case there were some who realized that he belonged with next year's mosquitoes rather than with last year's flies. Thus the *Sunday Mercury* wrote, "It does not seem right . . . that the whole machinery of the Federal Government, with its courts and marshals, should be placed at the beck of a man who has, somehow or other, chosen it for his private business to deprive this woman of her liberty." And the *Weekly Argus*: "One of our standing boasts, 'Liberty of the Press,' is ours no longer, when, in the opinion of any single person, the contents of a paper are not exactly moral or high-toned, and should therefore be suspended and its publisher indicted."

On the whole, however, the newspapers were not inclined to make an issue of the affair. The greatest impediment to any sane treatment of the obscenity question had already appeared; it always seems too utterly ridiculous to be taken seriously. Also working to the same end were latter-day America's concern with personalities and indifference to principles. The Claflin sisters obviously did not wear the white robes suitable to martyrdom; one was not unnaturally reluctant to identify their scandal-mongering with the cause of liberty. That obscenity had been used to cover what, if anything, should have been a libel suit, and that a private individual should have

succeeded temporarily in usurping governmental powers —these, the really important aspects of the case, it took such unusually keen eyes as those of the *Argus* to perceive.

II. Comstock and Congress

But Comstock had at any rate achieved the notoriety which in America is so akin to fame, and his followers were delighted. They decided to send him to Washington to obtain the passage of a federal law. Pleasantly armed with a large number of lewd photographs and pictures, which he had been diligently confiscating at every opportunity, Comstock now invaded the national capital. Congress was busy in its not infrequent occupation of investigating its own honesty, owing to revelations of wholesale bribes distributed among its members by the Crédit Mobilier, on behalf of the newly formed Union Pacific. Comstock's diary, during his stay in Washington, registered much indignation against the low-necked dresses worn by Congressmen's wives, but he was little worried by the political corruption of Congressmen themselves. Something in him reached out to understand their position. Later, when Boss Tweed was sentenced to imprisonment, his mood was one of unwonted sympathy. "Who makes me to differ?" he confided to his journal. "My temptations were not equal to this poor man's."

Anyway, the Congressmen, corrupt and uncorrupt, as soon as the news of Comstock's exhibit was passed around, showed themselves eager visitors, and, after long and careful study of his collection, agreed that something

certainly ought to be done about the situation. Having thus relieved their consciences, they took little interest in the fact that the extraordinary bill drawn up by Benjamin Vaughan Abbott—a consolidation of Comstock's and two other measures—went far beyond the question of indecent pictures. It was as if, to check a spring freshet, one should decree the removal of the snow on all the mountains. Probably the most evil of the many evil features of the bill was its inclusion together of obscenity, contraception, and abortion, thus confusing entirely different problems which in the interest of intellectual honesty, if nothing else, should have been kept apart. In its original form there was added to the clause prohibiting information as to contraception, the qualifying clause, "except from a physician in good standing, given in good faith." Even this slight concession to reason was stricken out, probably at Comstock's insistence, by an amendment offered by Senator Buckingham of Connecticut, who was in charge of the bill on the floor. The whole measure received in the Senate only ten minutes of discussion, during which Senator Conkling of New York in vain asked that the bill be printed "in order that we may know something at least of what we are voting upon." He said, "For one, although I have tried to acquaint myself with it, I have not been able to tell, either from the reading of the apparently illegible manuscript, in some cases, by the Secretary, or from private information gathered at the moment, and if I were to be questioned now as to what this bill contains, I could not aver anything certain in regard to it."

Perhaps Senator Conkling's difficulties will be shared

by the reader if he will glance hastily over this remarkable measure as though he were hearing it read haltingly from an illegible manuscript, with pauses probably in all the wrong places.

> Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or of whom, or by what means any of the hereinbefore-mentioned matters, articles or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed or how or by what means conception may be prevented or abortion may be produced, whether sealed or unsealed; and every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device or substance and every paper, writing, advertisement or representation that any article, instrument, substance, drug, medicine, or thing may, or can be, used or applied, for preventing

> conception or producing abortion, or for any indecent or immoral purpose; and every description calculated to induce or incite a person to so use or to apply any such article, instrument, substance, drug, medicine, or thing, is hereby declared to be a non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

The other Senators, however, did not care to understand the bill; they wanted simply to pass it and get on to something in which they were really interested. Practically without debate, and without a roll-call, the bill went through; the same thing occurred in the House on the last day of the session. Thus light-heartedly did Congress act on one of the most vicious and absurd measures that ever came before that august body. The law violated the first principle of just legislation which requires that crimes be defined with sufficient clearness to enable the honest citizen to avoid committing them. The absence of any definition of "obscene," other than by piling up equally vague synonyms, leaves the determination of the crime to the discretion of the Postmaster-General.

The Post Office, perhaps preferring thus to have publishers and authors at its mercy, perhaps deterred by the intrinsic difficulties of the situation, has consistently refused to issue any statement of its policy beforehand. Even more tyrannical is the clause prohibiting the "giving information . . . where or how or of whom, or by what means, any of the hereinbefore-mentioned matters . . . may be obtained. This means, for example, that if, in this year 1930, you should write to a friend telling him where he could obtain a copy of the most significant literary work of the last twenty years, James Joyce's *Ulysses*, you would be legally subject to a $5,000 fine, or imprisonment for five years, or both. Finally, the prohibition of contraceptive information imposes the moral ideas of a particular class upon the whole community. Contraception, as is well known, is avowedly considered a sin by the Catholic Church, and perhaps this view is shared by most of the Protestant churches, but it most emphatically is not shared by most of those outside the churches. In any case, the matter belongs in the realm of private morality where legislation can only intrude at the cost of becoming ineffective and ridiculous.

Incredible as it may seem, not only is this federal statute still in force today, fifty-six years after its passage, but in twenty-four states legislation modeled upon it is still unrepealed. Sometimes legislators were even able to outdo Comstock in severity: thus in the District of Columbia (under Congressional control) one is forbidden to tell anything that "will be calculated to lead another" to practice contraception, while in Colorado one is forbidden to bring contraceptive "knowledge" into the state!

It is the knowledge of contraception, not its practice, which is attacked in all but one instance, that of Comstock's native state, where in 1878 the following law wandered on to the statute books: "Every person who shall use any drug, medicinal article, or instrument for the purpose of preventing conception shall be fined not less than $5 or imprisoned not less than 60 days nor more than one year, or both." The Connecticut law was the only one which was logical, but when one cannot be logical without being an ass, it shows that there is something wrong with his premises.

The premises underlying all this legislation are two mutually contradictory propositions, both inherited by the Christian churches from early Jewish mythology. According to the first proposition, nature created by God is intrinsically good, and sex is intrinsically holy; man's duty is "to increase and multiply." Hence the interference with natural processes involved in contraception is a moral evil, and anything which renders sex disgusting is obscene. But according to the second proposition, human nature was hardly created before it fell into sin, of which sex is the clearest symbol; "they knew that they were naked and were ashamed." Hence conception is the moral evil, only to be condoned by legal marriage, and anything which renders sex attractive is obscene. Logic cannot be flouted thus with impunity. The confused thinking which grew out of the attempt to accept all these conflicting ideas, because they could all be found in the Bible, was directly reflected in confused living. It resulted in making sex both attractive and disgusting at the same

time. It created the dirty and disease-ridden modern bawdy-house, which particularly flourished in the period under discussion. If one sought for symbols of the eighteen-seventies in Anglo-Saxon society, one would choose Queen Victoria and the brothel for England, Anthony Comstock and the house of prostitution for America.

Just as Comstock felt a secret community of interest with corrupt politics, so also he felt a secret sympathy for prostitution. In all his multifarious moral reforms, he never attempted to reach the one real plague-spot in the sex-life of his day. So also with his many followers. They were blunderingly trying to preserve their own type of blundering thinking. They were trying to keep people like themselves in control of the situation. They were not so much seeking to correct the very apparent moral evils about them, as to forestall a change in mental outlook which they dimly sensed as imminent. The churches particularly, already feeling a cold wind abroad, began to seek shelter behind the law. This ecclesiastical shift from religion to politics, to be emphasized a generation later in the prohibition movement, commenced in the period of Comstockery. With all this reactionary force, by no means confined to the churches, behind him, Comstock, by the age of thirty, was a figure to be feared.

III. The Sinister Old Man

His extraordinary career may be clearly followed in *Anthony Comstock, Roundsman of the Lord* (1927), by Heywood Broun and Margaret Leech. In the single

year 1873, newly appointed "Special Agent of the United States Post Office" to enforce his own statute, he traveled 23,500 miles, arresting offenders, founding societies, appealing for more laws. In 1874 the New York Society for the Suppression of Vice was incorporated by the legislature with strange new powers. "The police force of the city of New York," said the Act of Incorporation, "as well as of other places, where police organizations exist, shall, as occasion may require, aid this corporation . . . in the enforcement of all laws . . . for the suppression of the acts and offenses designated in Section 3 of this Act. Any agent of the New York Society for the Suppression of Vice upon being designated thereto by the sheriff of any county in the State, may within such county make arrests." Here was a private organization suddenly empowered to take the place of the police and recognized as a semi-official part of the government. This was perhaps the first instance of that alliance between the state and the private snooper which was to become increasingly popular in the United States as private snoopers became more numerous.

Something childish in the American nature is appealed to by the opportunity to play the amateur detective. The same juvenile love of disguise and masquerade which caused so many otherwise decent people to join the Ku Klux Klan leads them to welcome the chance to act as spies upon their neighbors. Comstock, whose I. Q. would almost certainly not have rated him above the age of twelve, reveled in the pleasures of snoopery which his position afforded. The most famous case of this kind

was his trapping of Madame Restell, an abortionist on Fifth Avenue, sixty-seven years old, and about to retire from her business. Comstock went to her in disguise, told a pitiful tale of the poverty of himself and wife, and at last induced her to agree to perform an operation. On her arrest she killed herself, and Comstock boasted that it was the fifteenth suicide of which he had been the cause. About a month later Boston showed its approval of his act by organizing under his direction the Watch and Ward Society.

His two books, *Traps for the Young* and *Frauds Exposed*, enable one to perceive the sort of images that thronged his own mind. His favorite words betray him. "Traps," "snares," "scars," "putrefying sores," "branding irons," "talons," "carrion," "vulture," "jackal," "cuttlefish"—such were the companions of his fancy. One seeks in vain for any words of peace or loveliness. Those avenues he never entered. Instead, "Then ho for the Charles Street Jail!" as he ends one of his tales exultantly.

In 1902 another notable case of suicide was laid at his door. Ida Craddock, a former teacher of shorthand and a mystic, had produced *The Wedding Night*, in praise of which Dr. W. S. Rainsford, the well-known Episcopal rector of St. George's, New York, had written to her expressing the wish that all young people might read so beneficial a book. Comstock announced that the work expounded "the science of seduction," a United States Judge declared it "unspeakably obscene," and a jury which was not even permitted to see the book found the author guilty. Miss Craddock thereupon killed her-

self by inhaling gas in her room. She left behind a letter which said "I am taking my life because a judge at the instigation of Anthony Comstock has declared me guilty of a crime which I did not commit—the circulation of obscene literature." Dr. Rainsford wrote to Comstock: "I would not like to be in your shoes. You have hounded an honest, not a bad woman to death. I would not like to have to answer to God for what you have done." But Comstock was well content with his shoes. God would never condemn a special agent of the United States Post Office and the founder of the New York Society for the Suppression of Vice. "Cruel, uncivil, insulting, and unjustifiable" was the comment of Comstock's diary on Dr. Rainsford's letter.

So the sinister old man went on his way. In 1905 he called the attention of Police Commissioner McAdoo to Arnold Daly's impending performance of *Mrs. Warren's Profession* by "the Irish smut-dealer," Bernard Shaw. Police officers attended the first performance—one of unusual excellence, with Daly, Chrystal Hearne, and Mary Shaw in the leading rôles—and then suppressed the play. It dealt with the career of a courtesan, and although there were then estimated to be 100,000 members of that class on the sidewalks of New York, the public was not supposed to acknowledge their existence. The attitude of the police was that of the British government, which, when W. T. Stead exposed the white-slave traffic in an article, "The Maiden Tribute," promptly put Stead in prison for a year and did nothing about the traffic. The close resemblance between man and the ostrich was never better

illustrated. The actors, however, were later acquitted by a majority decision of two out of three justices, and the American public, reassured that Shaw was not obscene, could continue to attend his plays. But the decision came too late to reimburse Arnold Daly for the financial losses suffered by the closing of his theater. Commenting upon the melancholy later years of this brilliant actor, Walter Prichard Eaton writes, in the biographical sketch contributed to the *Dictionary of American Biography*,

> There can be no question but that his production of *Candida* and other Shaw plays, from 1903 through 1905, marked an important step forward in our theater, and had it not been for the disastrous interference of Comstockery and his subsequent bankruptcy and intensified truculence, his later influence might have equalled that of his early years. He was a double victim of himself and Mrs. Grundy.

As Comstock drew toward his dotage he constantly became more arbitrary and absurd. He ordered the Macbeth Galleries on Fifth Avenue to remove from its windows a picture which he deemed objectionable, forced a Broadway garment-maker to take from display an insufficiently clad wax figure, confiscated Art League pamphlets because they contained nude drawings, confiscated 2,000 copies of Daniel Corson Goodman's *Hagar Revelly* without having read the book, and objected to admitting to the mails the Rockefeller report on white slavery. But the United States government continued to stand behind him. "He has had and will continue to

have the hearty support of this department," wrote Postmaster General George B. Cortelyou in reply to protests.

IV. His Ghost Still at Large

At the age of seventy-one Comstock at last died. His body was laid away in Summit churchyard. The itching hands that had seized so many hapless shoulders and the restless brain that had teemed with cruel imagery were quieted forever. But on dark moonless nights the spirit of Anthony Comstock emerges from its grave and stalks abroad. You may meet it in its old haunts along the Bowery or on Boston Common or in those Western towns which it first visited fifty years ago. You will recognize it by its faded ginger-colored whiskers, now wraith-like, and by its muttering to itself as it moves along—"Libidinous—lascivious—lewd!"

In fact, Comstock's ghost, after the manner of ghosts, has become more witless than Comstock ever was. In the great national capital of the United States it has inspired the police to prohibit the playing of "immoral music"; in Texas it has penalized the use of "indecent language" over the telephone; and in seven states—Maine, Pennsylvania, Delaware, West Virginia, Louisiana, Wisconsin, and North Dakota—it tells all taxi drivers that they will be arrested if they knowingly drive any person to a rendezvous—it apparently being the custom in those guileless regions for one to hail a taxicab and say, "I have a rendezvous with Miss So-and-so at such-and-such a number; please drive me there immediately." Comstock in his earthly career never attained the reck-

less heights to which his spirit drove those inhabitants of Norphelt, Ark., who in 1925 passed Ordinance No. 20, reading:

> Sec. 1.—Hereafter it shall be unlawful for any man and woman, male or female, to be guilty of committing the act of sexual intercourse between themselves at any place within the corporate limits of said town.
>
> Sec. 3.—Section One of this ordinance shall not apply to married persons as between themselves, and their husband and wife, unless of a grossly improper and lascivious nature.

As a mere mortal Comstock arrested Margaret Sanger for circulating a pamphlet giving contraceptive information; as an immortal he has arrested Mary War Dennett (on trial at the time of writing) for circulating a pamphlet which merely explains the physiological basis of sex. In the flesh, he secured the temporary prohibition of *Mrs. Warren's Profession*; in the spirit, he secured the permanent suppression of *The Captive*. During his life he had the bad habit of demanding convictions on the basis of particular passages in a work, regardless of the context; after his death, and as recently as 1927, this bad habit was made the explicit legal practice of New York State by a statute prohibiting the production of a play any portion of which deals "with the subject of sex degeneracy or sex perversion." Under this law what would be done with such classics as *Edipus Rex*, *The Cenci*, and *Ghosts*? Let not the lovers of classic in any field expect immunity. The man Comstock kept his hands

off them, but the gibbering spook more recently at large in the customs and the Post Office has laid spectral paws on Rabelais, Boccaccio, and the *Arabian Nights*.

Section 305 of the Tariff Act of 1922 prohibits the importation of any obscene book, pamphlet, or picture. Furthermore, it authorizes the seizure of an entire package if it contains a single objectionable work—apparently on the theory that obscenity is a kind of contagious disease that will seep through the covers of a book and infect its neighbors. A partial list of authors some of whose works have been banned includes, besides the three mentioned above, Aristophanes (whose *Lysistrata* was excluded at the very time that it was being performed on the New York stage), Ovid, Casanova, Balzac, Pierre Louys, George Moore, and James Joyce. The library of Pittsburgh University found itself unable to import the works of the Earl of Rochester. Albert Jay Nock, after reviewing the Complete Works of Rabelais for the *Nation*, mailed the volumes to a friend in America, only to have them seized by the Collector of Customs at Chicago. The men who have performed these acts of literary vandalism do not seem to have enjoyed, or at any rate profited from, even a high-school education. Thus the inspector who confiscated George Moore's translation of *Daphnis and Chloe* admitted before the United States Customs Court at Baltimore that he did not know whether Chaucer was alive or dead. Under these circumstances it was much to be desired that Senator Cutting's recently defeated amendment to the new tariff law should have carried, abolishing the customs censorship. There would then at least have been one less gang of silly creatures to

contend with. In voting it down, however, the Republican majority stood by its traditional protective policy. Why not protect American obscenity, along with everything else American, against foreign competition? Help save our own good one hundred per cent American obscenity!

In that merry book, *To the Pure* (1928), by Morris L. Ernst and William Seagle, present-day procedure is shown to be precisely a fool's comedy. Books become obscene, then pure, then again obscene, according to erratic decisions in lower and higher courts; they are pure in one state and obscene in another; they are pure and obscene in different cities of the same state; they are pure in foreign languages and obscene in English; they are pure in expensive bindings and obscene in cheap ones; they are pure in sets and obscene in individual editions.

It is no criticism of a policeman *qua* policeman, of judge *qua* judge, or of "average citizen" *qua* "average citizen" to say that he is not qualified to act as a censor of art and letters. In the work mentioned above, the authors have some interesting remarks in this connection about juries. "The reading matter of juries," they say, "is a delightful subject. In the recent case against *Replenishing Jessica*, three jurors said they never read because of bad eyesight; eight others had never heard of such best-sellers as *Elmer Gantry*, *Oil,* or Ludwig's *Napoleon*. . . . One honest male declared he never read, "but my wife does the reading for the family." Yet these men constituted the jury of his peers insured by law to Maxwell Bodenheim.

"Obscenity," after fifty years of legal effort, is still as far from definition as it was at the beginning. The Post

Office bureaucracy, to be sure, seems to have adopted a working definition adequate for its own purposes: "Obscenity is anything which the Postmaster-General, or anyone else in the department, shall at any time declare to be obscene." Under this fairly broad interpretation it has denied mailing privileges even to such scientific works as Melchow's *The Sexual Life*, Butler's *Love and Its Affinities*, and Sanger's *History of Prostitution*. The serious student could not obtain these works, but at the same time the Post Office carried thousands of copies of Elinor Glynn's *Three Weeks* to delighted shopgirls and drummers.

The great city of Boston, on the other hand, specializes in the suppression of art, rather than of science. In the long list of works which have come under the Boston ban in recent years one finds the following:

The World of William Clissold, by H. G. Wells
Power, by Lion Feuchtwanger
Dark Laughter, by Sherwood Anderson
Oil, by Upton Sinclair
Elmer Gantry, by Sinclair Lewis
The American Tragedy, by Theodore Dreiser
The Sun Also Rises, by Ernest Hemingway
Farewell to Arms, by Ernest Hemingway (as first printed in *Scribner's Magazine*)
Manhattan Transfer, by John Dos Passos
Nigger Heaven, by Carl Van Vechten
Circus Parade, by Jim Tully
Strange Interlude, by Eugene O'Neill (stage performance).

In Boston, at least, obscenity has a consistent meaning. "Obscenity" is the same thing as "creative ability." The list includes nearly all of the significant contemporary American novelists, three of the most important European novelists, and the one great dramatist who has ever appeared in America. The authors attacked are all critics of society—that is the real offense. They are all attempting in one way or another to introduce a little clarity into the confused *mores* of the hour. And the last thing which the so-called reformer wants is any real reform.

There is one slight advantage in the present methods of censorship, but it is insufficient to outweigh the evils. As every one knows, the attempted suppression of a book or play on the ground that it is sexually exciting is the best possible publicity. With their penchant for attacking the most important books, the vice-sleuths have undoubtedly in many cases promoted the sale of good literature. Americans first awoke to Walt Whitman in 1887 when a Boston district attorney threatened to attack his publisher unless twenty-six poems were modified; the good gray poet's royalties mounted in consequence until he was able to buy his home in Camden. James Branch Cabell might still be unknown and unread had not John Sumner made a best-seller of *Jurgen*. And more recently the first threat to prosecute *The Well of Loneliness* sent the sales bounding upward. Perhaps Boston, which has long since ceased to produce creative writers, is, after all, still doing its bit for literature in the only way that remains to it.

But these cases are considerably less numerous than the general public supposes. They require the able coöpera-

tion of an aggressive publisher to spread the news of the attempted censorship. And, obviously, they occur only when the attempt is unsuccessful. Even then, without churlishly begrudging an author his royalties from whatever source received, one may doubt whether the cause of letters is permanently promoted by such methods. The schoolboy who thumbs his Chaucer in order to find the jovial "Miller's Tale" or whose acquaintance with the Bible is confined to the story of the too-careless Lot, hardly gains in this way a very deep appreciation of poetry or religion.

The truth is that the whole idea of adult censorship is indefensible. One must insist that it represents an unwarranted intrusion of the state into the realm of private morality. Its real aim is the suppression of thought, not the suppression of vice; the war is primarily against ideas, not against immoral music or indecent language over the telephone. One motive underlies all the attacks—fear of sex enlightenment. Freedom of discussion and the rational approach—these are the dreaded foes. To seek the ultimate source of the reformer's terror would lead at this point too far into psycho-analysis. Students of "morbid fears and compulsions" will recognize the type. It is a form of the deepest sex perversion which has turned the very instinct of life against itself. We are not here concerned with the reformer's inner life, however, but with the aims and results of his reforms. His methods are evidently self-refuting. One must first discuss in order to prevent discussion. Every effort to stop discussion leads simply to more discussion. If sex has become the chief

theme of discourse in present-day America, the reformers are in large part the cause. They have made the subject even more exciting than it is by nature. They are rebellious weapons, but weapons none the less, in the hands of the gods of change.

CHAPTER XII

Education in Bondage

Education for the children of all the people, extending from the primary grades through the university, constitutes America's noblest contribution to civilization.

—Calvin Coolidge

A general state education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body.

—John Stuart Mill

Any teacher who shall have publicly reviled, ridiculed or otherwise spoken or acted with disrespect and contumacy towards the flag of the United States or its official uniforms or insignia, or towards the system of government of the United States, and its Constitution, or shall refuse to take and subscribe to the oath of allegiance hereinbefore required, shall thereafter forever be disqualified to teach in any public or private school within this state.

—*North Dakota Law of 1921*

CHAPTER XII

Education in Bondage

I. The Trembling Teacher

In 1647 the Colony of Massachusetts declared its faith in education as serving to "thwart that auld deceiver Sathan" in his "cheife project to keep men from ye knowledge of ye Scriptures." Since eternal salvation depended on this knowledge, schools were manifestly of supreme importance, and the Colonists, at least in the north, spared no efforts to establish them. The first colleges—Harvard, William and Mary, Yale, the College of New Jersey (now Princeton), and King's (now Columbia)—were founded mainly to turn out clergymen armed with the necessary learning to give religious instruction. Just as truly as the Christian church was the parent of education in the Middle Ages, so was it in the United States. The Fundamentalists who are trying to turn back the schools to their state of nonage are merely foolish parents who refuse to admit that their children have grown up.

During the quickening of interest in politics induced by the struggle with Great Britain the Colonists learned to see a secondary advantage in education. Besides opening

the gates to eternal salvation it could teach the temporal art of self-government. With the establishment of a republic based on general representation, the school became almost as important to the state as it had previously been to the church. In 1784 Jefferson wrote: "Every government degenerates when trusted to the rulers of the people alone. The people themselves are its only safe depositories; and to render even them safe, their minds must be improved to a certain degree." It was with this moderate hope that he later founded the University of Virginia.

The separation of church and state—first accomplished in the modern world by Roger Williams in his Providence Plantations (Rhode Island) in 1663, and gradually adopted by the other states after the Revolution—did not immediately secularize the schools. The church retired from the field only slowly and with dignity. It was not until Jacksonian democracy brought popular suffrage in its train that the imperative need of public schools was generally recognized. In the wake of public schools came the great state universities one by one. Meanwhile the larger private institutions of the east were definitely secularizing themselves. Long before the end of the nineteenth century, although there were still many religious colleges dotting the countryside, it was evident that the main trend of education in America was to be secular. This trend has continued until now it is difficult not to regard the school as the natural successor of the church in the rôle of guardian of the ideal interests of mankind. Certainly some of these ideal interests—the physical and social sciences, and to a less extent the arts—look pri-

marily to the school for their protection and support. Since the sciences and the arts embrace the entire field of human history, together with all the methods of rational investigation and all the established truths concerning the behavior of nature and of human beings, it is hardly too much to say that the school, more than any other institution, is the custodian of our spiritual welfare.

To carry this vast responsibility with any prospect of success, the school ought clearly to possess tremendous prestige, independence, and ability. As a matter of fact, it possesses no one of the three. Successor to the church though it may be, heir to many of the former functions of the church though it undoubtedly is, the school does not enjoy a tithe of the respect paid to its predecessor. Even the Protestant churches have behind them a tradition of centuries in comparison with which the school, at least in this country, is a parvenu. More damaging still to the school's relative prestige is the fact that it deals only in blessings, never in curses; unlike church and state, it has neither hell nor prison at its command. And its blessings—the intrinsic blessings of education—are of a kind which it takes education to recognize. Finally, there is the slightness of the material rewards which the school can give even its most loyal servants. This was of little moment in the palmy days of the clergy; opportunities of enormous wealth had not yet arisen to obsess the public mind; the clergyman, though poor, was not painfully poorer than his neighbors. But today the teacher, who is obliged to live in a noticeably smaller house, wear noticeably cheaper clothes, and drive a noticeably older car

than does the business man, is likely to find difficulty in preserving the latter's respect. Worse than that, he is likely in some degree to forfeit his own respect. Can he look firmly in the eye the banker who remembers overdrawn accounts, the merchant who recalls unpaid bills, the owner of the Rolls-Royce who edges his ramshackle Ford into the curb? And when these gentlemen are, as they may be, members of his board of education or regents of his university and undertake to tell him, as they sometimes do, what he shall or shall not teach, is he likely to remind them that education is primarily his field, not theirs? Will he not tend subconsciously to accept their estimate of him as a mere employee who can be easily replaced? Will he not, hugging his slender salary to his unmanly bosom, scurry home as quickly as possible? The history of recent American education shows that he will and does. If he lacks the courage to protest in his own behalf, he will be even less prompt to take up arms in defense of some other member of the faculty who is under attack. In over fifty cases of violation of academic freedom in American universities during the last twelve years I fail to find a single instance of effective faculty action in defense of its own dignity. In the high schools, to be sure, there is recorded one solitary case of successful rebellion when in Hazel Park, Michigan, over a hundred women school-teachers defied an order of the school board prescribing ankle-length skirts. The incident, however, is hardly sufficient to restore its lost prestige to the whole profession!

In exchanging religious for political and industrial

domination the teacher gained little in the way of independence. Perhaps he actually lost by the exchange. Formerly it was freedom of thought in religion and morals that was barred; today it is freedom of thought in politics and morals, with, in some instances, religion added. And much the same interference with personal liberty which the clergyman of old could tolerate as a tribute to his influence still dogs his less influential successor. One smiles when he reads that about 1825 the Reverend Laurens Hickok, soon to become the ablest philosopher of his day in America, was formally charged with "unministerial conduct, such as whistling, vaulting fences, running in the streets, and driving a fast horse." But about a century later the superintendent of schools of Los Angeles confessed to the writer that he dared not smoke in public. It has taken a hundred years for the spirit of moral intolerance to cross the continent from Connecticut to California, but it has not changed its color on the journey. The chief difference between the two cases seems to be that Laurens Hickok actually indulged in "unministerial conduct" while the modern superintendent dared not even begin to be "unprofessorial."

Anyone familiar with the situation knows that the high-school teacher is hedged in by innumerable petty rules and restraints. Nagged, browbeaten, and bully-ragged on the minutiæ of his or, more usually, her private life; constrained to spend hours each week on useless red tape requirements devised by picayune-minded school boards; swamped with extra-curricular activities—what wonder if the harassed teacher's mind eventually takes on the dye of its surroundings?

The contract (in a North Carolina school) quoted by Thomas Minehan in "The Teacher Goes Job-Hunting," *Nation,* June 1, 1927, is unusual only in its delightfully frank expression of that idea of the public ownership of the teacher which is everywhere rampant; this contract, after stipulating a salary of eighty-five dollars a month for a seven and a half months' year, contained the following additional clauses to be signed by the teacher:

> I promise to take a vital interest in all phases of Sunday-school work, donating of my time, service, and money without stint for the uplift and benefit of this community.
>
> I promise to abstain from all dancing, immodest dressing, and any other conduct unbecoming a teacher and a lady.
>
> I promise not to go out with any young men except in so far as it may be necessary to stimulate Sunday-school work.
>
> I promise not to fall in love, to become engaged or secretly married.
>
> I promise to remain in the dormitory or on the school grounds when not actively engaged in school or church work elsewhere.
>
> I promise not to encourage or tolerate the least familiarity on the part of any of my boy pupils.
>
> I promise to sleep at least eight hours a night, to eat carefully, and to take every precaution to keep in the best of health and spirits in order that I may be better able to render efficient service to my pupils.

I promise to remember that I owe a duty to the townspeople who are paying me my wages, that I owe respect to the school board and the superintendent that hired me, and that I shall consider myself at all times the willing servant of the school board and the townspeople and that I shall coöperate with them to the limit of my ability in any movement aimed at the betterment of the town, the pupils, or the schools.

Those who rise to be principals or superintendents too often find their profit in conforming to the prevailing attitude of the community and waste their time in teapot tempests. In 1924, for example, the whole state of California was wrought up over a "serious problem" of secondary education. A superintendent in Santa Paula refused to employ teachers with bobbed hair. Ought such a policy to be generally adopted? Pro-bobs and anti-bobs argued the case in the public press. President Campbell of the University of California solemnly declared that "there is no relation between scholarship, teaching ability, and especially character on the one hand, and bobbed hair on the other." Finally the matter was laid at rest by the canny commissioner of secondary education, who pointed out that there were not enough unbobbed heads in California to fill the places which would become vacant. The state wisely decided that even bobbed teachers were better than no teachers at all.

Lest it be thought from these instances that California is worse than other places, may I recall to my readers further east that in New York City a teacher was dis-

missed for asking his class to read Romain Rolland's *Jean-Christophe*? And lest some one who has never been there may fancy that the Middle West is different, may I add that last year in one of the largest Middle Western universities an English professor of national reputation was called upon the carpet for discussing Joyce's *Ulysses* in class? Petty intolerance knows no limits of latitude or longitude in this country.

All these cases are really similar and point toward more serious evils. Take away the school-teacher's rights over her own hair, and you will soon try to take away her rights over her own thoughts. Invoke the law against those whom for any reason you dislike and you will soon be led to invoke lawlessness to the same end. The training in petty persecution which the community receives through its bullying of the school-teacher is directly connected with its action in larger affairs. It may seem merely amusing when a bill is introduced in the North Carolina legislature to make flirting with college girls or teachers a misdemeanor, but the spirit back of that bill is essentially similar to that which guided the guns of the Gastonia mob and led the grand jury implicitly to approve the murder of Mrs. Wiggin. A fool easily becomes a criminal. Intolerance is a habit-forming drug far deadlier than morphine. Begin by taking it in small doses and one ends with appalling speed as the Gastonia type of "drug-fiend."

The result of the present situation, so far, at least, as the high-schools are concerned, is well summed up by Dorothy Dunbar Bromley, writing under the pseudonym of Stephen Ewing in *Harper's Magazine*, February, 1928:

"The time has passed when able young men considered teaching as a possible profession. And now one finds comparatively few young women of real personality entering the profession."

II. The Proud Business Man . .

Under the old system of government by the clergy, with all its defects, education was still in the hands of a body of men who were themselves educated. That is no longer the case. In state institutions the ultimate control is in the hands of the "sovereign people," which usually means in practice that it is in the hands of some sectional group—Irish, German, Ku Klux Klan, or what not—which happens to dominate the particular locality. Let this group once become excited, and education is at its mercy. Obscurantist laws are passed, such as the anti-evolutionary legislation of Oklahoma (1923, repealed 1925), Tennessee (1925, sustained by state supreme court), Mississippi (1927), Arkansas (1928), Texas and Louisiana (adopted by administrative action without statute), or committees of politicians and pseudo-patriots are appointed to decide upon the merits of text-books written by our ablest historians, as in New York City, Chicago, and other supposedly enlightened communities. Such group movements, however, have been generally unable to touch the great private institutions of the east and even elsewhere have been, up to date, rather spasmodic in character (though no one knows when they may become chronic)—with a single exception which is unfortunately the most sinister group influence of all and which

concerns public and private institutions alike. The immediate as contrasted with the ultimate control of education in America is vested in so-called boards of education, regents, trustees, overseers, or visitors, which, whether elective, appointive, or self-perpetuating, share the common characteristic of being composed preponderatingly of business men. Whatever one's opinion of American business men, he can hardly deny that, however great their integrity and intelligence, they represent a special interest and are in no sense experts in education. In fact, experts in education are not desired on these boards. In a list compiled by Professor Scott Nearing in 1917, covering 143 institutions, the proportion of educators to non-educators on the boards was only that of 1 to 10, while in state universities alone it sank to 1 to 17. If there has been any change in these proportions during the last twelve years, it almost certainly has not been a change for the better.

In defense of these strange groups of non-educators in control of education, it is sometimes said that the boards actually have very little to do with the normal conduct of affairs in the school or the college. It is a curious defense of a governing body to say that it does not govern, but in this case the statement also happens to be untrue. The board controls the budget, and, through its annual disposition of the school's income, it determines the educational policy of the institution. It decides how many scholarships shall be given to athletes. It decides whether the institution needs a new stadium rather than a new library. It decides whether a drive for new students should not be inaugurated even though

there are already more students than can be taught properly. It decides whether Professor So-and-so shall be dismissed because of his socialistic, anarchistic, atheistic, or immoral opinions. And it decides all these questions in accordance with its habitual business convictions. To enlarge the plant, to increase the output, to gain public confidence through alert publicity, to silence disturbing doubts—these seem to the board its fundamental duties.

From the decisions of the board there is no real appeal. Only four states have state-wide tenure-of-office laws, and these are so indefinitely framed that dismissal of teachers for almost any cause can easily be camouflaged to come under their provisions. "Incompetency, insubordination, conduct unbecoming a teacher [page Laurens Hickok!], decrease in the number of teaching positions"—are all considered justifiable causes of dismissal. "Conduct unbecoming a teacher" may cover any form of "disloyalty" —criticism of athletics, of military drill, of the churches, of the government. Professors have been dismissed for each of these. Or, if we wish to get rid of a particular man, what is easier than to abolish his particular courses as unnecessary—in which case there is a "decrease in the number of teaching positions." Not by such flimsy laws is academic freedom to be saved. As a matter of fact, the American teacher is on perpetual probation. If for any reason he becomes obnoxious to the local chamber of commerce, the large business interests of the state, or any of the more active "patriotic societies," he runs great risk of summary execution irrespective of his educational abilities.

The action of the boards is doubtless often swayed in

private institutions by the attitude of the alumni. Of the two evils government by the alumni is perhaps to be preferred to government by boards. The former have at least once been to college, which is more than can always be said for members of the latter. But this advantage is largely offset by the tendency of the alumnus to regard "the preservation of college tradition" as his main duty. "The two most striking efforts of our time to transform colleges into real institutions of learning,"—thus writes Professor Zechariah Chafee in *The Inquiring Mind*—"Woodrow Wilson's at Princeton and Alexander Meiklejohn's at Amherst, both failed, and despite the presence in each case of other factors, failed mainly because a large body of alumni did not want that kind of college." Later he tells how a powerful group of Harvard alumni opposed the work of Professor Davison to improve the taste of the Glee Club, arguing that it would accustom the members to a higher type of music than they could find after graduation. The chief desire of the alumni is to keep their college just as it was in their own day. It would be difficult to find in the whole country a more essentially conservative group. Because the college they knew consisted mainly of fraternities and football, it must consist of fraternities and football till the end of time. Where, if anywhere, freedom of speech is already an established college tradition, they may be expected to defend it; but where, as is more generally the case, suppression is the rule, they may be counted upon to defend suppression.

The power to check invasions of academic freedom which is wielded by the American Association of Uni-

versity Professors, admirable as its work has been, is utterly inadequate to meet the situation. In the nature of the case, the association can only act belatedly. Suppose several professors are unjustly dismissed. If they or other members of the faculty appeal to the association, the latter will make an exhaustive investigation and after some months will report its condemnation of the authorities. There the matter usually ends. The regents may or may not read the report. The dismissed professors are not reinstated; they have probably already departed. The one tangible result is that the prestige of the particular university has been lowered in the eyes of the profession. The trust that this may lead the regents to reform their ways remains a pious but dubious hope. In these circumstances, the majority of loyal professors are naturally reluctant to call upon the association for aid when the only thing certain is that this will at least temporarily injure their university. They prefer to suffer and to let their friends suffer in silence.

With all these facts in mind, it is surprising that the quality of the teaching profession in America is as good as it is. This speaks volumes for the sheer fascination of purely intellectual pursuits. But decline has already set in, which if unchecked will strictly parallel the decline of the clergy. Real educators, like Charles Beard and James Harvey Robinson, will more and more seek to do their work through books and magazines. The teachers of America even now lag behind the authors. They will lag farther and farther as their ranks are increasingly filled with a smaller breed of men. The tendency is already obvious in the case of college presidents. A genera-

tion ago there were educational giants in the land—Eliot, Hall, Andrews, Gilman, Schurman, Angell, Harper, Van Hise, Jordan. Where are their successors? Their place is being taken by a crew of little creatures, increasingly of the promoter type, young smiling bagmen of learning.

III. The Happy Student

The efficiency of a university is to be judged primarily by the quality of its students. Of all American universities, the two oldest, Harvard and Yale, are probably least encompassed by the evils which have been discussed. They enjoy greater prestige than any other institutions, there has been little overt interference with academic freedom, and the members of their faculties are men of unquestioned ability. The culture and intelligence of the Harvard and Yale students may fairly be taken to indicate the high-water mark of American undergraduate attainment. Several years ago the *Crimson* published a report of the favorite magazine-reading of Harvard students as indicated by the number of magazines sold in one month on Harvard Square. The list ran as follows: *Saturday Evening Post*, 1,000 copies; *Liberty*, 500 copies; *Cosmopolitan*, 300 copies; *Red Book*, 225 copies; no others above 50. About the same time a partial questionnaire at Yale revealed a similar cultural condition. The favorite magazine was found to be, overwhelmingly, the same *Saturday Evening Post* beloved of Harvard; the favorite prose author proved to be Stevenson, with Dumas a close second; the favorite character in history was Napoleon; the biggest world figure of today was declared to be Cal-

vin Coolidge. In other words, the students in these two great private institutions have the same preferences and opinions as the people outside who have never been to college. *A fortiori*, the same condition would be found to prevail in the public institutions.

The American university has become truly "democratic." It accurately reflects the general state of public opinion as expressed, for example, in the Rotarian and Kiwanis clubs. It does not mould or even guide public opinion. The business ideals of the regents have everywhere triumphed over the cultural ideals of the faculty. The student's real life is not centered in the classes which he languidly attends, but is scattered over the multitudinous extra-curricular activities which absorb his time and interest—athletics, fraternities, social life, class politics, the school or college paper or papers, innumerable "drives" and "campaigns" of one sort and another—in all of which, however, he learns that art of meeting men and using them as means for his own ends which is the inner secret of commercial success. The fond parent need no longer be troubled by his son's question whether he shall enter business or go to college; he enters business in either case. The college graduate of today is no longer the sad "misfit" mourned by business men in former years. He is cut perfectly to suit the prevailing pattern. To the credit of modern business it must be said that the pattern, when worn by engaging youth, is far from unattractive. It is loose enough to permit the freest exercise of bone and muscle; it is tolerant of pleasure; it promotes every form of daring outer activity. But beyond that, it does not serve. The young men and young

women of today who are so amazingly capable in external matters are pathetically devoid of internal resources. Deprived of constant companionship, they pine; in solitude they would perish. They are able to get anything they want but are unable to want anything particularly worth getting. Their reach never exceeds their grasp; their aims are nearly always unworthy of their talents. The college, which above all else should supply some notion of a better life, does nothing for them here. The college graduate is merely the young man of action whom we all know, well mannered and well groomed, alert, energetic, worshipful of "putting it over," skeptical of ideals, indifferent to ideas—and in his handsome empty head he carries the fate of the nation.

IV. What Might Be Done

The aim of education today is avowedly to produce "good citizens." The term is vague, but presumably it means, in a general way, a body of high-minded men and women, of trained intelligence, keen sense of social values, and much devotion to the common welfare. If the term means less than that in ordinary parlance, I do not think there are many educators who would admit that it meant less than that to them. But they have failed to impart any such trained intelligence, sense of values, and devotion to the common welfare, because they have not been free even to make the effort. The war showed their utter powerlessness to affect national thought in time of crisis. The universities, instead of resisting the general hysteria, became themselves centers of hysteria. Those professors

who ventured to protest merely brought dismissal on themselves. The greater number, who remained, lapsed into a silence which is still unbroken. The apparent decrease in infringements of academic freedom since the war is largely due to a decrease in attempts to exercise this freedom. And over and above all particular infringements there remains the general and permanent infringement in the form of alien control of the most important academic activities.

There are several popular arguments which aim to justify the teacher's present supineness. They are usually advanced by those who have an interest in keeping him supine. Occasionally they are reached for by the prostrate teacher himself, who finds his recumbent position easier than getting up would be. The first of these arguments is that "the teacher is an employee of the government and therefor should agree with the government." This is little more than a play on words. It derives its apparent force from confusing the two meanings of the word "government," which may refer either to the permanently organized state or to the temporarily governing party in that state. If the proposition read, as it should, "the teacher is the employee of the permanent state and therefor should agree with the temporary party in power," the fallacy would be obvious.

The second argument is similar, but is a little more plausible. It runs: "the people support the schools and therefore have the right to determine what shall be taught in the schools." The error here may be brought out by an analogy. The people also support and often even elect their judges, but this gives them no right to determine

the judge's legal opinions. The responsibility of the judge is not directly to the people, but to the law; so the responsibility of the teacher is not directly to the people, but to education. In each case the people, directly or indirectly, choose some one to perform for them a task which they cannot perform themselves. If they attempt to perform it themselves, there is an end of both law and education. He is recognized as an infamous judge who yields to popular clamor in rendering his decisions; equally is he an infamous teacher who yields to popular clamor in his teaching.

The recent senatorial discussion of censorship in connection with the tariff bill brought out clearly the misapprehension which some of our legislators cherish as to the ethics of the situation. Senator Wheeler had pointed out to Senator Blease of South Carolina that someone in the state university had declared that the majority of the faculty was opposed to censorship.

"I never heard of him," Blease retorted, "but I promise that if he is a professor in the university and made such a statement, he won't be there more than 30 days."

"You'll put him out?" inquired Wheeler.

"I sure will!" Blease explained. "I won't have him drawing South Carolina money."

Finally, there is the argument that the teacher is a specialist whose duty it is to teach his own subject and let the world go hang. This theory enables the professor to retire into his ivory tower and pursue his own interests with a clear conscience. It is a pleasant theory for one who wishes to avoid social responsibility. But it makes the supposed teacher of citizenship something less than

the average citizen. It leads directly to Alexandrianism the divorce of scholarship from life. The real scholar is always, as Emerson would say, man specializing, not a specialist masquerading as a man. Furthermore, certain departments—notably economics, sociology, history, philosophy, and English—can hardly, by the narrowest specialization, entirely avoid all topics of general human interest. Every such subject is debatable, and the teacher is likely to encounter group hostility which will be more intense the more important the subject. The specialization theory leaves the departments in the first-line trenches to bear the whole brunt of the battle for academic liberty.

The general problem is really fairly simple. This is an age of group activity. The control of education has passed from the group of educators to a group of special interests unfamiliar with the aims of education. A movement in the reverse direction must be started. As long ago as 1913 Professor J. Cattell, then at Columbia, published the result of extensive inquiries which tended to show that fully 85 per cent of the faculties of our universities were profoundly discontented with the system of university government. Professor Cattell raised the crucial question whether it would not be well for faculties to appoint both regents and presidents. Out of 299 answers from men of high educational standing, 185 were unqualifiedly favorable, 68 were conditionally favorable, and only 46 were negative. Here the cynic may impatiently interrupt. "Naturally," he may say, "the faculties would like to control the universities, but why should they? You yourself," he may add, "have not claimed for them exceptional ability or courage. Why then do you

suddenly begin to argue for an extension of their powers?" The answer, I hope, will be clear from all that has preceded. The demand is merely that education shall be put in the hands of those who have devoted their lives to a study of its problems, and who therefore presumably have the best knowledge of what education means. It is the same kind of demand that has long been recognized in every undertaking that is efficiently conducted. Imagine a bank managed by men who knew nothing of banking, or a railroad managed by men who did not know the difference between a Pullman and a freight car! I should not want teachers in charge of business, nor do I want business men in charge of teaching. But that teachers should be in charge of teaching seems to me not unreasonable.

Nothing short of such a radical change will save education from its present bondage. Nor would it be an insuperable task to accomplish. Less than 85 per cent of the American Colonists were profoundly discontented with the system of British government, yet they managed to obtain their freedom. If our faculties had a little of the spirit of their ancestors they could do the same. If they had one-quarter of the *esprit de corps* of business men, they could do it. True, the American Revolution was not accomplished in a day, nor in a day could the teacher become a freeman. But if even a beginning were made, the rest would follow in time. If the teachers would first reform themselves, they might reform the world. If they would abjure pedantry and learned cowardice, and assert their right to perform their duty, eventually the community might gladly recognize them. Then edu-

cation would be in the hands of those who knew what to do with it. Then millions spent on schools would not so largely be millions wasted. Then good citizenship would actually be taught. And not merely the teacher but the nation would once more be free.

CHAPTER XIII

The Ice Cracks

He only earns his freedom and existence
Who daily conquers them anew.

—GOETHE

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CHAPTER XIII

The Ice Cracks

I. Where Liberty Is Not

To criticism of one's own country there is a facile answer, a kind of retort discourteous, which is always heard: "Well, if you don't like America, why do you stay here? Why don't you go to live in the British Isles or France or one of the other countries which you admire so much?" As if that would make any difference! Similar advice was freely offered in England at the beginning of the nineteenth century, and it was taken by some of those who best loved England and who continued, in Switzerland or Italy, to live and write for England. So with many of our expatriates today. From London, Paris, or the Riviera their works reach us, and these works nearly always deal with America. One who really cares about his country takes it with him wherever he goes. The expatriates who have found contemporary conditions at home too intolerable to live with close at hand still live with them imaginatively at a distance. They are doing what little is being done to maintain respect for America abroad. They are far better patriots than the loud-mouthed booster who has never left his native village but is sure that the United

States is the greatest nation in the world. If they cannot live at home, the shame is ours, not theirs.

But a possible alternative to exile still remains for the liberal. Tom Paine is said to have replied to Franklin's boast, "Where liberty is, there is my home," by an even prouder boast, "Where liberty is not, there is *my* home," a boast which the stormy petrel of freedom made good in many lands. In similar vein, Ibsen is said to have remarked that Russia was the only place in which a free man could live, because there alone was liberty denied—and therefore valued. It is only when we have lost some great good that we begin to appreciate it duly. Health is most desired by those who are sick, youth in old age, and the delights of country life by those compelled to live in crowded cities. In America freedom had come to be so taken for granted that it possessed no charm; now that it must be fought for, the charm has returned, enriched with a new and arduous beauty.

The greater the unfavorable odds, the more stirring the conflict. So each man loses eventually his fight with death, but that is no reason for accepting this final defeat a day earlier than necessary. Freedom being, like knowledge, an intrinsic good, the slightest momentary gain is at least so much snatched from chaos and the dark. In 1915 Randolph Bourne said to the writer, "I suppose America is hopeless," but he knew well that suppositions are not proof, and that hope takes its rise from inner determination, not outward evidence. Knowing this, he continued to defend the unpopular cause, preferring poverty and ostracism to any selling of his ready pen to those who would have paid him well for it. Since then there

have been other and more fortunate Randolph Bournes, flaming torches in the night—Sinclair Lewis, Villard, the staff of the *Mercury* and the *New Republic*, the faculty of the Harvard Law School, even two judges of the Supreme Court, and countless others—a mobilized minority striving, not quite in vain, to overcome the prejudice and dullness of the many. It were better to fail, the poorest in such company, than to be one of the actual rotarian rulers of the land. But on the larger issues will not this company of writers go down in history as another lost legion, like the whole school of Hebrew prophets whose ringing words were of no avail to their contemporaries? Perhaps. The ice has cracked. Whether it be to close again more firmly or to open broader lanes leading to the ocean, who can tell?

II. The Program

One gain is clear. We know where we stand. We know how thorough has been the defeat of liberalism. And we know how it occurred—no great battle, but a series of skirmishes, one here, one there, the line gradually broken at so many points that finally no line was left. Hence the program for the future is clear. There is no event too small to be important where the issue of liberty is involved. One trivial incident leads to another less trivial, and so on until the major incident comes bulwarked with a thousand minor precedents. Liberty is one, not many. Its principle is the same in every field. The problem is to develop a new national mood—the mood of

humanity and tolerance. Certainly it is doubtful whether this can be done, with the evil precedents which we have now behind us. But so much the more reason for a supreme effort ere it be too late. If only too late were not so near at hand!

The time is likely to be short. Give America thirty years without another war and she may possibly recover her old love of liberty and honor. But if another war comes much sooner, conducted as it will be on the principles established by the last war, the chances will be slight. To quote for the last time from Zechariah Chafee, in his article, "Propaganda and Conscription of Public Opinion" in the *Harvard Alumni Bulletin*, December 11, 1924:

> After the next war, critical thinking in this country will be practically impossible. . . . The tradition of free speech in wartime has been shattered. The Supreme Court has shown that it will give no protection to it. The officials will find ample precedents at hand for censorship and prosecutions. Once the war begins, any attempt to have its aims defined in public opinion, except as the government wishes, any attempt to argue that the time has arrived for it to cease, will be perilous indeed. Therefore, those of us who value the preservation of an intelligent public opinion in this country must bend our every effort to the end that there shall be no next war.

The old adage, "In time of peace, prepare for war," must give way to another, "In time of peace or war, pre-

pare for peace." Otherwise the present time of peace will be no more than a momentary truce before the real Armageddon.

III. Our Legacy to Youth

During this perhaps momentary truce, gallant and gay, the younger generation swings into line. Their heads are held high, they go laughingly. No group was ever more in love with life, none ever faced more fearlessly the chances of death and fate. And for the first time in history the women are beside the men, or perhaps a little in advance of the men. The modern flapper suffers from no undue suppression, and she is but an extravagant form of a contemporary urge in the whole sex toward self-expression. We smile, perhaps a little fearful of the new phenomenon; like D. H. Lawrence in *Pansies*, we wonder

> What has happened in the world?
> the women are like little volcanoes
> all more or less in eruption.

Anatole France's last message to us, brought by Waldo Frank in *The Rediscovery of America* (1929), appropriately began with a smiling tribute to American womanhood—not the abstract "American womanhood" celebrated in sermons, but that visibly present in the flesh:

> Anatole France is an old man and soon he will die. . . . He is quarreling with me. "You write of Puritans: how could Puritans beget such women?" In

> his hand is an American magazine open at the photograph of girls on a beach. . . . Suddenly his face is dark. "We are old—old," he says. "Do not cheat our hope."

"Girls on a beach." There is more reason to hope for aid from them than from all the solemn sermons. There is a new frankness, a new intellectual honesty abroad. The young comrades of both sexes may indeed be counted on to make short work of old Anthony and his prurient followers. They will make short work of many an old sentimentalism. They learned of themselves—we never taught them, save unintentionally—that all men are liars. They demand facts, not words. Nature's loins are surely still unwithered when in this late epoch of human history she can create so new and vital a race. Theirs is the terrible beauty, the terrible sensual arrogance of youth; theirs is also a hard skepticism hitherto unknown to youth. They dance—are they dancing in the dawn of a newer, freer day?

Listen more closely to their laughter: it is a little forced. They are gay, but a little too determinedly gay. They are already aware of the tragic uncertainty of life, and that perhaps is well; but it is not well to be merely reckless in consequence, much more reckless even than has always been the wont of youth. The mood is too much that of "After us, the deluge." If courage and energy, without thought, could solve all problems the future would be safe in their hands. Even as it is, they could probably be trusted to solve the problems of their own creation, but over their heads hangs the old doom of

the House of Atreus, evil debts not of their making but none the less to be paid by them in full.

What is our legacy to American youth, the inheritance which the older generation leaves to its cherished sons and daughters? Class suspicion, class injustice, a nation hated by the world, corrupted institutions and a corrupted government. By what miracle shall careless youth recover the ancient rights, the possibilities of high civilization which their fathers squandered? This sharp-eyed younger generation, quick to detect the lies beneath the moral ideals preached by their non-practicing elders, has scant belief in the nobler possibilities of a human nature of which those about them are such sorry specimens. They deny all gods, good and bad, with one exception—the Great God Business. To the question, "Is this, then, the true god?" they reply cynically with Shelley's Demogorgon, "He reigns." And yet they are far better than they themselves believe; it is conceivable that they may conquer. But if not, when in the sunset these young men, old men in their turn, look upon the harvest which others sowed and they have gathered, and the night of curses comes, older, better legacies than ours may then be recalled, and in the new defeat the endless task once more resumed—the task which William Blake in the first flush of American liberty hymned for his own country but equally obligatory in every place and time:

> I will not cease from mental fight,
> Nor shall my sword sleep in my hand,
> Till we have built Jerusalem
> In England's green and pleasant land.

PARTIAL LIST OF LIBERAL ORGANIZATIONS

American Association of University Professors
Secretary, H. W. Tyler, 222 Charles River Road, Cambridge, Mass.

American Association of University Women
Executive Secretary, Belle Rankin, 1634 Eye St. N. W., Washington, D. C.

American Birth Control League
152 Madison Avenue, New York City.

American Civil Liberties Union
Director, Roger Baldwin, 100 Fifth Avenue, New York City.

Association Against the Prohibition Amendment
Director, John Gebhart, 21 East Fortieth St., New York City.

Authors' League of America
2 East Twenty-Third St., New York City.

Federal Council of Churches in America
105 East Twenty-Second St., New York City.

Fellowship of Reconciliation
Bible House, Astor Place, New York City.

Freethought Press Association
250 West Fifty-Fourth St., New York City.

General Defense Committee
1001 Madison St., Chicago, Ill.

League for Independent Political Action
Chairman, John Dewey, 52 Vanderbilt Ave., New York City.

Mary Ware Dennett Defense Committee
Chairman, John Dewey, 100 Fifth Avenue, New York City.

Moderation League
385 Madison Avenue, New York City.

National Catholic Welfare Conference
61 Whitehall St., New York City.

People's Lobby
Executive Secretary, Benjamin Marsh, 35 B. St. N. W., Washington, D. C.

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